

A TREATISE
ON THE
LAW OF
PUBLIC UTILITIES

INCLUDING

MOTOR VEHICLE TRANSPORTATION
AIRPORTS AND RADIO SERVICE

BY

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FOURTH EDITION, REVISED
AND ENLARGED

IN THREE VOLUMES

Volume I

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PREFACE TO FOURTH EDITION

The growth and development of the law governing public utilities, since the issue of the last edition, have been so marked and the application and modification of legal principles to new conditions and situations in recent years have been so extensive as to require the enlargement of this treatise into three volumes.

Questions concerning production, prices, and waste in their relation to the regulation of the oil and gasoline industry; distinctions between public and private utilities, such as the sale of theater tickets, the production and sale of ice, the operation of employment bureaus and cotton gins; and the proper regulation of motor vehicles—all these have been further defined by the courts.

The determination and regulation of the proper charges for equipment and supervision by parent or holding companies as they affect local rates for service and in their relation to interstate commerce in the matter of defining reasonable rates for service are of the greatest importance and legal interest.

The rules of valuation for determining the proper rate base and the items necessary to consider in finding reasonable rates still constitute the great body of the law on Public Utilities, and are treated in many interesting recent decisions. These cases, together with all others bearing on every phase of Public Utility law, have been analyzed and presented in these pages. These developments and the extension of the subject-matter to cover the highly interesting and important questions of municipal airports and the proper regulation and control of our marvelous radio service demand elaboration in order to give an exhaustive and comprehensive treatment of the entire subject.

The law of municipal airports in connection with the operation of airplane service marks a distinct advance in the development of the question of the powers of municipal corporations and furnishes a most interesting illustration of the attitude of our courts towards an increase of the sphere of municipal activities. In holding that municipal corporations may build, maintain, and operate their own airports, which represent extensive land holdings and investments located beyond the municipal limits, because this is a municipal purpose and serves the public conveni-

ence and the necessities of the municipalities, the courts have materially extended the powers of municipal corporations. While municipalities have not been permitted to erect and maintain or operate stations for steam, electric, or interurban railways as a part of their municipal activities, practically all the courts have held that they may provide and operate municipal airports and landing fields as a means of increasing their field of activity and of encouraging travel and communication by air service.

Radio service, which today probably represents the most phenomenal development of modern times in its scope of service, extent of interest and practical advantages in the public interest, convenience, and necessity, also furnishes the occasion and creates the necessity for the development of regulations to control this service properly. Because of the nature and extent of radio service, federal regulation and control by the specially created federal radio commission are necessary as this service is interstate and in fact world-wide in its scope. The federal radio commission, as constituted, was created and operates by congressional authority which is fully defined by the Federal Radio Act, and this furnishes a new, fertile field for the development and application of the principles of the law of Public Utilities. While certificates for other forms of service issue where public convenience and necessity require, certificates for radio service are issued for public interest, convenience and necessity.

The jurisdiction of this commission covers the entire country and affects practically all of its inhabitants, directly or indirectly, for radio service as a means of communication is world-wide, and seems capable of furnishing all lines of service now provided by wire, so that its development in connection or in competition with wire service furnishes further fields for the application of the legal principles under discussion in this treatise.

The reception and distinguished consideration given the former editions have been appreciated and accepted as ample justification for continuing the same method of treatment of the subject and have been assumed as the measure of the obligation imposed on the author in the preparation of the present edition, which is now respectfully submitted to the American bench and bar in the hope that it may merit and receive the same cordial reception accorded former editions now out of print.

Indianapolis, September, 1932.

Oscar L. Pond

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THE LAW OF PUBLIC UTILITIES

CHAPTER 1

INTRODUCTION

The most outstanding and remarkable feature of our civilization of today is the unparalleled growth and development of municipal activity, which is both extensive and intensive. Municipalities have increased in number and size and municipal problems, particularly those of transportation and communication, are of vital personal interest to many millions of persons; and their solution, which is constantly coming to be more difficult and necessary, directly affects the larger and more influential portion of our population.

The solution of many of these problems lies in the extension of the sphere of municipal activity and in state regulation and control of public utilities. Formerly municipal corporations, like governments, generally were regarded as organizations which should preserve order and, within the limits of the law which it was their duty to enforce, permit the greatest possible freedom of action to the individual from whose unlimited initiative and energetic activity it was believed the community as a whole would derive the utmost advantage.

Unlimited or insufficiently regulated private initiative and individual activity, however, produced such evils that it became necessary to resort more and more to the repressive activity of municipal as well as state and federal government. At first such governmental restraints in many instances were regarded as inconsistent with the individual rights guaranteed by our constitutions. But when those who thought that their constitutional rights were being violated through the increase in the activity of governmental authority appealed to the courts it was decided that all individuals held their rights subject to the regulatory power of the municipal, state, and federal governments. The courts thus enunciated and developed what they called the police power. Through the exercise of this power the community and society at large could protect itself against any undue emphasis

by the individual on what he regarded to be his constitutional rights within the provisions of the constitution.

Of late, however, it has become evident that due consideration for the rights of the community and adequate protection of the public welfare can not be secured through mere repressive governmental action, and that the only way in which the greatest present advantage and prospective advancement of the interests of the public as a whole can be secured is through the positive action of our governmental agencies making greater opportunities more uniform and available to all the people for the improvement of their material as well as their moral conditions. As the problems of our modern civilization become most acute in the complex conditions which obtain in our cities, this necessity for the extension of the sphere of governmental activity has naturally assumed the form of a demand for the municipal ownership and operation of what have come to be known as municipal public utilities in case their adequate regulation and control by state or municipal commissions fails to secure satisfactory service at reasonable rates.

But just as when the necessity for the extension of repressive governmental activity became apparent it was alleged that such action was prohibited by our constitutional provisions protecting private rights, so it is now claimed that the system of municipal government provided for in our constitutions and in our law of municipal corporations is distinctly governmental in its character and purpose, and that the city, as we know it, may not enter into the proprietary field of private business. In this connection it has been said that the city in our system is organized for government and not for profit, and that its activity should be confined to matters of regulation and to enterprises which private interests will not undertake because their pursuit is unprofitable; and that remunerative enterprises should be left to private capital which will undertake all that is necessary and execute them better than the city can be expected to do.

This treatise on the law of municipal public utilities attempts to ascertain both the nature of the municipal corporation as expressed in the law and in the construction which the courts have given to the powers conferred upon the municipality by the state, to discover what limitations are placed on municipal activity by our constitutions, as construed by the courts; and how far the judicial construction of the law with regard to the taxation and sale of municipal public utilities facilitates or impedes the cities in the discharge of these new duties imposed

by the ownership, operation or proper regulation and control of municipal public utilities, which they are being called upon to assume; and also to ascertain what are the most efficient methods of regulation and control available to the state or municipality over the operation by private capital of municipal public utilities, and how far commission control can and should be made final and conclusive of the facts involved which determines the nature and extent of the power of such control as fixed and determined by cases on appeal to the courts.

As in the past the courts developed the idea of a repressive police power whose exercise was found necessary and not inconsistent with constitutional private rights, so they have elaborated the doctrine of the implied powers of municipal corporations through whose application the cities are recognized as possessing powers which at one time were denied them, and by which they are permitted to keep abreast of the times and adjust themselves to current economic and social conditions, thus affording themselves and their inhabitants the advantages of the most modern facilities and latest inventions and appliances.

Municipal ownership and operation is regarded by the courts as being entirely consistent with our constitutional system. There is no constitutional objection to the grant by the legislature of the widest powers relative to the municipal ownership and operation of municipal public utilities. And it is submitted that the only alternative to municipal ownership and operation of municipal public utilities is their adequate regulation and control by the municipality or by a state or municipal commission acting under authority conferred upon it by the state, thus affording private initiative and investment the opportunity to serve the public on ordinary business principles under proper legal restrictions and regulations.

Under efficient and intelligent regulation and control of the service furnished by municipal public utilities and of the rates received therefor, the necessity and occasion for municipal ownership or operation as a means of regulation and control, which in most cases is the chief purpose and the controlling motive, virtually disappear, although the power of municipalities to own and operate their municipal public utilities should always remain available to be exercised as occasion may require or the best interests of the city may demand.

The courts in their consideration of the powers possessed by municipal corporations have generally adopted the principle of liberal construction where its adoption was necessary to permit

these corporations to extend their sphere of activity in order to render to their inhabitants the services so necessary in modern urban life, and with this purpose in view they have developed the idea of powers implied from the very nature of such corporations as organs for social service. With the idea that municipal corporations, which have entered into what is often called the field of private business, are really discharging a service which is just as public in character as the preservation of the peace, the care of the public health and safety or the care of the poor, the courts have consistently refused to make any distinction between the property used for these so-called commercial purposes and that used for governmental purposes by denying that one class of property is to be taxed any more than the other or is to be governed by any more liberal laws as to its sale or alienation. Of course the courts do not take the view that it is not subject to taxation or alienation but merely that as property devoted to a public service it is untaxable and inalienable in the absence of statutory provisions to that effect.

With the idea that municipal public utilities are public in their service and purpose whether in public or in private hands, the courts have assumed that the interests of the public must first be considered in their decisions as to the powers held and conferred by municipal corporations in their grant to private corporations of these public utility franchises. To reserve the power and opportunity for free and open competition in the operation of municipal public utilities, the courts have not favored exclusive franchises and have refused to recognize the power of municipal corporations in the absence of statutory authority to grant exclusive franchises or to imply that a franchise was exclusive where any other reasonable construction was possible in case it was found that the municipality granting the franchise had the legal right to make it exclusive.

Because competition alone, however, fails to secure adequate service at reasonable rates in an industry which is naturally monopolistic in character, all the courts have agreed that the legislature has the power of controlling the service and of regulating the rates of these municipal public utilities. At the same time, however, either because they feared too drastic action by municipal corporations or because of a reluctance to abandon the rule of strict construction of municipal charters, they have denied that the municipal corporation has the right, in the absence of a statutory provision to that effect, to regulate these

rates except where it had reserved to itself such power to regulate in the franchise at the time of its grant.

In laying down these rules the courts have fully recognized that in the very nature of the relation the controlling motive of private companies is the pecuniary advantage of their stockholders, and that unless checked this motive tends to result to the public disadvantage. On the other hand they have frequently called attention to the fact that the only legitimate motive actuating municipal corporations is public service rather than private advantage. They have therefore recognized that in the absence of legislative authorization a private company operating a public utility may sell its plant to a municipal corporation, although a municipal corporation may not reverse the process. And while the courts have naturally not been called upon to decide as to the expediency or the policy of municipal ownership and operation of municipal public utilities, since the decision of this matter in concrete cases is a legislative or administrative question of business policy for the municipality concerned to decide for itself within the limits of the statutes rather than a judicial one, the courts in a number of instances have indicated that the trend of modern thought is favorable to municipal ownership and operation in cases where public regulation is not available or successful.

The efficient and impartial enforcement of the rights of the municipality and its inhabitants in order to obtain adequate service at fair uniform rates is just as essential as, if indeed it is not more necessary than, providing the necessary power and authority in the municipality in the first instance to insure such service for itself and its citizens. The strict persistent enforcement of the law and the franchise or contract rights available to the municipality and the rights of its inhabitants under indeterminate permits and commission regulation is generally found necessary to secure satisfactory service at a fair uniform rate.

The public utility commission is the latest form of securing the necessary intelligent regulation and control and is attended with the least possible expenditure of money and time necessary to secure the desired results. A public utility commission established by the state or a municipal commission or bureau created pursuant to authority conferred upon the municipality by the state for that purpose is a permanent administrative body of trained experts whose services are always available for the purpose of investigating and adjusting the conflicting rights and

liabilities that are necessarily constantly arising between the opposing parties involved in furnishing and using any municipal public utility service. The members of such a commission are not only specially trained for this service, but they give it their exclusive attention, and the information secured in connection with the investigations and adjustments made in the course of years furnishes, at a comparatively nominal expense, the necessary technical data in detail which, when properly classified by the commission, constitute the basis for the investigation and adjustment of any question arising as to any particular municipal public utility.

The fact that a franchise or permit under regulation is not automatic in its operation and that statutory provisions for the regulation of municipal public utility service are not self-executing furnishes ample justification for a public utility commission. Being a matter of business administration the commission which is naturally and properly composed of trained business experts along this particular line not only furnishes the best and most efficient method for regulating the business but also, by separating it from other municipal affairs and political considerations, should relieve it of the greatest practical difficulty which generally attends the administration of such business matters by the ordinary municipal officer who is selected by a political party, and because of the manner of his selection and the short term of his service can not be or become an expert on the subject of the proper regulation and control of public utilities.

With the business of municipal public utilities placed in the hands of such a nonpartisan permanent commission of capable men specially trained for rendering such service, these very important and extensive business interests, in which every inhabitant of the municipality as well as the municipality itself is vitally interested, should be separated from political matters and party politics which are naturally all too often controlled by and in the interest of those in charge of their municipal public utilities. Whether other municipal affairs are matters of business rather than politics, there can be no question but that all matters of municipal public utilities are business questions and not political ones which accordingly can only be properly disposed of in a business way and by men especially informed and experienced in such affairs rather than by municipal officers selected by political parties for a short term of service. There is no more justification for expecting satisfactory and ef-

ficient administration of municipal public utility affairs at the hands of municipal officers who are thus selected at such frequent intervals than would be the case in the affairs of any large private business concern. Both alike require capable experienced men specially trained and permanently in charge of the regulation or administration of such concerns.

As municipalities show greater ability to conduct their own municipal and business affairs there is properly a general tendency to permit them to do so. This is evidenced by recent constitutional provisions in a number of states granting what is commonly known as "home rule" for municipalities. The first duty of the municipality toward properly controlling and disposing of its municipal affairs so far at least as they are concerned with municipal public utilities is the creation of a franchise bureau or a state or municipal public utility commission for the purpose of securing complete and accurate information concerning the franchise or contract provisions of its municipal public utilities and all other information in regard to their investments, maintenance and operation; and whether there be a state public utility commission or not, each municipality has problems of local regulation and control peculiar to itself and should have complete and accurate information in regard to all its municipal public utilities as well as an administrative body composed of capable experienced men able to cope with those in charge of the affairs of the municipal public utility itself in the interest of the public and of its inhabitants.

Such a bureau or commission of experts should investigate and cooperate with the municipal authorities on all questions of franchise rights and attend to their enforcement constantly and consistently as well as to the service rendered by the company and determine the reasonableness of the rate received by it for the service, for it is evident that, in a business of such magnitude with as many details of administration and technical questions involved as are common to the affairs of municipal public utilities, the municipality and its inhabitants can only be in position to secure and know that they are receiving proper service at a fair uniform rate by the employment of such men as are capable of investigating and determining such questions equally with the officers of the municipal public utility itself.

While the municipal commission, bureau or other administrative department of the municipality is of great value, the expense of maintaining one properly equipped and sufficient in itself would be prohibitive to all but the large municipalities. This

fact makes necessary state public utility commissions. Many municipal public utilities are becoming interurban in their scope and are no longer local to the particular municipality whose jurisdiction accordingly is not sufficiently comprehensive to provide the necessary regulation and control. Where several municipalities are alike interested in the control and operation of the same municipal public utility, it is evident that the control which they would thus exercise independently of each other, being naturally local in each instance, could not be uniform. Each municipality is necessarily limited to its own territory so that the only method by which to secure adequate regulation is through a state public utility commission.

The information necessary and the data essential to insure a comprehensive regulation of the service and a fair uniform rate can be secured to the best advantage by the state in connection with a public utility commission of trained experts on the subject. They in turn can serve similar departments of the municipalities of the state in an advisory capacity, and each supplementing the other, can secure the best results at the least expense. The theory of the regulation of municipal public utilities by the state through such a commission is to avoid competition which is now generally recognized as a needless economic waste and an entirely insufficient method of securing the necessary regulation and control. Under this method the state through its commission takes the place of competition and furnishes the regulation which competition can not give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities.

On the other hand the municipal public utility, operating under what the public utility laws of the states aptly designate the "indeterminate permit," is protected against competition and a possible loss of its plant occurring at the expiration or forfeiture of the franchise. Under this law the public utility commission determines in the first instance whether public convenience and necessity demand municipal public utility service where such a company proposes to install its plant and furnish such service, and only after a determination of this question in the affirmative and the granting of its consent by the commission may the municipal public utility plant be installed; thus avoiding needless competition by legalizing a monopoly. The consideration, however, for such franchises and exclusive privileges is that they shall be constantly and completely under the regulation and control of the state through its public utility

commission and that their owners furnish adequate and satisfactory service at reasonable rates.

This control covers the question of the capitalization of the municipal public utility so that the amount of stocks and bonds issued by such a company is determined by the public utility commission, which should also supervise and regulate the construction costs of the plant, thus insuring the expenditure on the plant of all funds received from the sale of such stocks and bonds as well as limiting such expenditure and preventing extravagance or unnecessary construction under the prudent investment theory recently suggested by the United States Supreme Court. This control over the capitalization and issue of stock and bonds of the municipal public utility by the state not only protects the consumer of the service by securing a fair rate, as based on the necessary or prudent investment, but also the investor in public utility securities. It insures on the one hand proper service at a reasonable rate as determined by the actual necessary cost and on the other a fair return on the investment actually and properly put into the business. By such regulation, capitalization and proper investment coincide which simplifies the matter of rate regulation as well as that of making investments in the securities of such companies and preventing fluctuation in their values. Under the prudent investment theory only those investments are permitted in the capitalization and valuation of the investment which are essential and necessary to secure the proper service.

The completeness of the commission's control and the validity of its rulings depend on the integrity of its findings on questions of fact and on the justice of its decisions as to matters of reasonableness. The nature and scope of the right of appeal and the extent to which the decision of the commission is made final and conclusive on all questions of fact fix and determine the authority of commission control. Appeals from all its decisions are generally and properly limited to matters of law and reasonableness of facts upon which such decisions are based.

The most important and far reaching question of regulation and control by commissions in process of determination is that of motor vehicles operating for hire as common carriers. This industry has developed so rapidly and independently of any such control that the questions arising under conditions of competition in the absence of their control and regulation by commissions demand early and adequate attention.

Many jurisdictions are now solving these questions as they have heretofore been determined as to other utilities by their proper regulation and control in the interest of such motor vehicles themselves and with reference to other existing common carriers, to the end that all concerned, and especially the public and its service, may have full consideration and fair treatment. If, as experience seems to justify and require, regulation is to take the place of competition in this as in other fields of public utilities in order to avoid the expense of needless duplication of investments and operating costs for the purpose of securing the best possible service at the least expense, motor busses, trucks, and all similar forms of common carrier service must be regulated and controlled by impartial federal and state commissions of trained experts having jurisdiction over public utilities generally and especially over all forms of communication and transportation.

The law of municipal public utilities, which it is the purpose of this treatise to expound fully and impartially, has been enunciated and developed chiefly by the decisions of our courts of record. While these decisions are very numerous and exceedingly practical they are comparatively recent. The third edition contained more than twice the authorities on which the former editions were based, thus indicating that the courts handed down more decisions and disposed of more questions on the subject in twelve years than were rendered altogether prior to that time on the subject; and practically all the decisions of our commissions have been rendered since the issuance of the first edition. While the fourth edition has almost half as many additional authorities as the former ones contained, although it covers but seven years, this current edition also includes new matter on transportation and communication by airplanes and radios. Those facts together with the fact that the decisions are frequently conflicting and the subject rapidly developing constitute at once the reason and the justification for making the gist of the decisions the basis and the authority for this treatise. This method of treating the subject has been employed to make the work more authoritative and of greater practical value to everyone interested in this very important subject.

CHAPTER 2

THE TWO CAPACITIES OF MUNICIPAL CORPORATIONS

Section

1. Powers of municipal corporations.
2. Classification of powers.
3. Public and governmental powers.
4. No liability for governmental powers.
5. Limitation of governmental powers.

Section

6. Proprietary business powers.
7. Liability of municipality.
8. Powers and liability determined by capacity.
9. Municipal public utilities as business concerns.

§ 1. Powers of municipal corporations.—Municipal corporations, like all others, are creatures of statutory origin, and possess only the powers granted to them by the legislature. These powers consist of those granted in express words; those necessarily or fairly implied in or incident to the powers expressly granted; and those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.¹

§ 2. Classification of powers.—The powers with which municipal corporations are endowed by the legislature creating them are divided into two main classes so that municipal corporations act in two distinct capacities. The one is governmental, legislative or public; the other is proprietary, commercial and in this sense quasi-private. In the former capacity the municipal corporation in exercising its governmental or public power acts as an agent of the state which creates it in preserving the public peace, administering justice and in attending to the public health, providing fire protection and in the carrying on of the public educational system for the general good and the public welfare.²

§ 3. Public and governmental powers.³—Over all these public and governmental powers exercised by the municipal corpora-

¹ *New Decatur v. Berry*, 90 Ala. 432, 7 So. 838, 24 Am. St. 827; *Spaulding v. Lowell*, 28 Pick. (40 Mass.) 71; *Smith v. Newbern*, 70 N. Car. 14, 16 Am. Rep. 766. *Dillon Mun. Corp.* (5th ed.), § 237 and cases cited.

² This section of second edition, cited in *Denver v. Mountain States Tel. & T. Co.*, 67 Colo. 225, 184 Pac. 604.

³ This section of second edition cited in *Uvalde v. Uvalde Elec. & Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662.

tion in its capacity as an agent of the state the authority of the state is by virtue of the very nature of the relation essentially supreme and unlimited in the absence of constitutional limitations. The officers of the municipal corporation are trustees for the public whose powers are wholly delegated to them by the sovereign and strictly limited by the statutes granting them so that such officers can not circumscribe the legislative powers of their successors by making contracts for the discharge of a purely public governmental duty. Such governmental functions and public powers must be left free and untrammelled so that they may be exercised at any and all times for the benefit and to the best advantage of the citizens as conditions change and emergencies arise. A municipality can not abridge its legislative governmental power by contract, nor is it liable for the negligence of its officers or agents in the performance of such corporate duties or for their failure to exercise such corporate powers.⁴

In the case of *Penley v. Auburn*, 85 Maine 278, 27 Atl. 158, 21 L. R. A. 657, the court held invalid a covenant of the city to open a certain street and maintain it in that condition permanently, expressing its decision to the effect that such a covenant was void, being beyond the power of the city to make, by saying: "No case has been cited that holds a municipal corporation liable to an individual, on its covenant to perform a municipal duty required of it by law."

The case of *Hamilton v. Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007, in holding a covenant of the city to provide drainage for a private individual void expresses the principle as follows: "The city has no power to make a contract obligating itself to furnish or provide drainage for plaintiff's lands. In providing drainage for lands within or adjoining its corporate limits, it exercises governmental functions. When it accomplishes this end, its powers in this respect cease. In doing that, it might incidentally drain the lands of the plaintiff, but it could not contract to

⁴ Federal. *United States v. Sault Ste. Marie*, Michigan, 137 Fed. 258. Connecticut. *In re Board of Water Comrs.*, 87 Conn. 193, 87 Atl. 870, Ann. Cas. 1915A, 1105.

Georgia. *Horkan v. Moultrie*, 136 Ga. 561, 71 S. E. 785.

Illinois. *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913E, 305.

Indiana. *Hamilton v. Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007.

Maine. *Penley v. Auburn*, 85 Maine 278, 27 Atl. 158, 21 L. R. A. 657.

New York. *Springfield Fire & Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. 667.

North Carolina. *Asbury v. Albe-marle*, 162 N. Car. 247, 78 S. E. 146, 44 L. R. A. (N. S.) 1189.

furnish drainage for plaintiff's lands in the future. Such contract is beyond the scope and purpose of the city's existence. The future requirements of the city may demand that the drain be abandoned or filled up and discontinued."

In the case of *Springfield Fire & Marine Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. 667, where the court refused to hold the defendant city liable for the destruction of a house by fire due to the alleged negligence of said city in operating its waterworks system, the court said: "When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature, and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation."

§ 4. **No liability for governmental powers.**⁵—The manner as well as the extent to which it may be proper for the municipal corporation to exercise these public governmental powers, within the limitations fixed by the law creating them, are necessarily intrusted to the will and judgment of the municipal authorities to whom they are delegated, and such authorities are permitted and expected to exercise their discretion in such matters. Because these powers are public and governmental in their nature and the duties imposed by them are executed by the authorities in the exercise of their discretion, the municipal corporation is not liable for a failure to perform such duties nor for the erroneous exercise of such powers. A municipal corporation, for example, can not make a contract with the owner of a building to put out a fire therein and then require him to pay for such service, nor can it expose itself to liability if it fails to put out the fire with regard to which it has attempted to make the contract.⁶

⁵ This section of second edition cited in *Uvalde v. Uvalde Elec. & Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662.

This section of third edition cited in *Holmes v. Fayetteville*, 197 N. Car. 740, 150 S. E. 624.

⁶ *Federal*. The *Maggie P*, 25 Fed 202.

Indiana. *Brinkmeyer v. Evansville*, 29 Ind. 187; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647.

Iowa. *Snouffer v. Cedar Rapids*

The case of *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538, illustrates this principle and states the reason for this rule of law. The action in the case was for a breach of covenant for the quiet enjoyment of the premises which the defendant city had leased to the plaintiff for church and cemetery purposes. After making the lease and pursuant to a statute the city by ordinance prohibited the further use of the premises for a cemetery. In refusing relief to the plaintiff for the reason that the city had no power to limit its legislative discretion by covenant the court said: "Sixty years ago, when the lease was made, the premises were beyond the inhabited parts of the city. They were a common, and bounded on one side by a vineyard. Now they are in the very heart of the city. When the defendant covenanted that the lessees might enjoy the premises for the purposes of burying their dead, it never entered into the contemplation of either party, that the health of the city might require the suspension or abolition of that right."

In the case of *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647, the court states this principle of the inability of the municipal corporation to contract with reference to its public or governmental duty by saying: "A private corporation that obtains a license to use the streets of a municipality takes it subject to the power of a municipality to enact a general ordinance; for a governmental power such as that exercised in enacting police regulations can not be surrendered or bartered away even by express contract."

Again in the case of *Snouffer v. Cedar Rapids &c. R. Co.*, 118 Iowa 287, 92 N. W. 79, the court expressed this well-established legal principle to the effect that, "in the absence of statutory authority, a contract or agreement, whether in the form of an ordinance or otherwise, which directly or indirectly surrenders or materially restricts the exercise of a governmental or legislative function or power, may at any time be terminated or annulled by the municipality."

§ 5. Limitation of governmental powers.⁷—The powers of the municipal corporation in its capacity as an agent of the state

&c. R. Co., 118 Iowa 287, 92 N. W. 79.

New York. Brick Presbyterian Church v. New York, 5 Cow. (N. Y.) 538.

Ohio. Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

South Carolina. Black v. Columbia, 19 S. Car. 412, 45 Am. Rep. 785.

⁷ This section of second edition cited in *Uvalde v. Uvalde Elec. &c. Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662.

This section of third edition quoted in *Fink v. Clarendon* (Tex.), 282 S. W. 912; *Hamler v. Jacksonville*, 97 Fla. 807, 122 So. 220, and cited in *Chrysler Light &c. Co. v. Bel-*

are well defined and strictly limited by the statutory provisions granting them. There is little or no opportunity here for invoking the doctrine of liberal construction nor for extending its sphere of activity by the doctrine of implied powers. It is the duties of the sovereign that are to be performed in the manner provided by law and its interests alone are to be considered.

On the other hand, the municipal corporation in its private proprietary and essentially business or commercial aspect acts as a property owner and the proprietor of a business enterprise for the private advantage of the city and its citizens as a distinct legal personality and may exercise its business powers very much in the same way as a private individual or corporation. In the erection and operation of gas works, electric light plants, water-works and the like, as well as in contracting for such service and in attending to matters of local interest merely for the special benefit and advantage of the city and its citizens, a municipal corporation acts as a business concern.*

field, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

*Federal. Los Angeles Gas & Co. v. Los Angeles, 241 Fed. 912, P. U. R. 1917F, 833, aff'd. in Los Angeles v. Los Angeles Gas & Co. Corp., 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76; Tulsa v. Oklahoma Nat. Gas Co., 4 Fed. (2d) 399; Oshkosh v. Fairbanks, Morse & Co., 8 Fed. (2d) 329; Tillman v. District of Columbia, 29 Fed. (2d) 442; Hall v. Jackson, 30 Fed. (2d) 935; New York v. Federal Radio Commission, 36 Fed. (2d) 115, 59 App. D. C. 129; Griffin v. Oklahoma Nat. Gas Corp., 37 Fed. (2d) 545.

Alabama. Pilcher v. Dothan, 207 Ala. 421, 93 So. 16; Bessemer v. Barnett, 212 Ala. 202, 102 So. 23.

Arizona. Barron G. Collier, Inc. v. Paddock (Ariz.), 291 Pac. 1000; Tucson v. Sims (Ariz.), 4 Pac. (2d) 673.

California. Marin Water & Co. v. Sausalito, 168 Cal. 587, 143 Pac. 767; Morrison v. Smith Bros. (Cal.), 293 Pac. 53.

Colorado. Keefe v. People, 37 Colo. 317, 87 Pac. 791, 8 L. R. A. (N. S.) 131; Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. 293, 11 Ann. Cas. 187; Denver v. Mountain

States Tel. & T. Co., 67 Colo. 225, 184 Pac. 604, P. U. R. 1920A, 238.

Illinois. Palestine v. Siler, 225 Ill. 620, 80 N. E. 345.

Indiana. Indianapolis v. Indianapolis Gas Co., 66 Ind. 396; Logansport v. Public Service Commission (Ind.), 177 N. E. 249, P. U. R. 1931E, 179, 76 A. L. R. 838.

Kansas. Holton v. Kansas Power & Co. (Kans.), 9 Pac. (2d) 675.

Kentucky. Henderson v. Young, 119 Ky. 224, 26 Ky. L. 1152, 83 S. W. 583; Phillips v. Kentucky Utilities Co., 206 Ky. 151, 266 S. W. 1064; Board of Councilmen v. White, 224 Ky. 570, 6 S. W. (2d) 699.

Louisiana. Solomon v. New Orleans, 156 La. 629, 101 So. 1; Vicksburg, Shreveport & Co. R. Co. v. Monroe, 164 La. 1033, 115 So. 136.

Massachusetts. Davis v. Rockport, 213 Mass. 279, 100 N. E. 612, 43 L. R. A. (N. S.) 1139.

Missouri. Public Service Commission v. Kirkwood, 319 Mo. 562, 4 S. W. (2d) 773.

Nebraska. Metropolitan Utilities District v. Omaha, 112 Nebr. 93, 198 N. W. 858.

New Hampshire. Blood v. Manchester Elec. Light Co., 68 N. H. 340, 39 Atl. 335.

New York. Port Jervis Water Co. v. Port Jervis, 151 N. Y. 111, 45 N.

This principle of the liability of the municipal corporation on its contracts made pursuant to the power and authority conferred upon it by the state is well illustrated and accurately stated in the case of *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271, 34 L. R. A. 518, decided in 1896. In holding the defendant city liable for the payment of rentals for water service furnished by a private corporation, and accepted and used by the city for many years in accordance with a contract formally executed by the parties, the court expressed the rule of liability in the following pertinent words: "A city has two classes of powers; the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi-private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private in-

E. 388; *Van Alstyne v. Amsterdam*, 119 Misc. 817, 197 N. Y. S. 570, *affd.* in 207 App. Div. 882, 201 N. Y. S. 954.

North Carolina. *Mabe v. Winston-Salem*, 190 N. Car. 486, 130 S. E. 169; *Pleasants v. Greensboro*, 192 N. Car. 820, 135 S. E. 321; *Holmes v. Fayetteville*, 197 N. Car. 740, 150 S. E. 624, P. U. R. 1930A, 369.

North Dakota. *Chrysler Light & Co. v. Belfield*, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

Ohio. *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953, P. U. R. 1918B, 683; *Travelers Ins. Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711.

Oklahoma. *Maney v. Oklahoma City (Okla.)*, 300 Pac. 642.

Oregon. *Mollencop v. Salem (Ore.)*, 8 Pac. (2d) 783.

Rhode Island. *East Providence Water Co. v. Public Utilities Commission*, 46 R. I. 458, 128 Atl. 556.

South Dakota. *Watertown v. Watertown Light & Co.*, 42 S. Dak. 220, 173 N. W. 739, P. U. R. 1920C, 771.

Tennessee. *Lewis v. Nashville Gas & Co.*, 162 Tenn. 268, 40 S. W. (2d) 409.

Texas. *Fink v. Clarendon (Tex.)*, 282 S. W. 912; *Community Nat. Gas Co. v. Northern Texas Utilities Co. (Tex.)*, 13 S. W. (2d) 184; *Uvalde v. Uvalde Elec. & Co. (Tex. Com. App.)*, 250 S. W. 140, P. U. R. 1923D, 662.

Virginia. *Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 138 S. E. 503.

Washington. *Wylde v. Seattle (Wash.)*, 299 Pac. 385.

Wisconsin. *Highway Trailers Co. v. Janesville Elec. Co.*, 187 Wis. 161, 204 N. W. 773; *Chicago, St. Paul, Minneapolis & C. R. Co. v. Black River Falls*, 193 Wis. 579, 214 N. W. 451.

dividual or corporation. * * *⁹ In contracting for water-works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens."

In defining these two capacities of municipal corporations and indicating their limited powers to fix or regulate rates for electric lights by contract the court in *Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662, held that: "They are either governmental functions performed by virtue of power conferred upon the municipality as a legal agency of the state to be exercised in the administration of affairs affecting the people generally or proprietary business powers granted for the special benefit of the urban community embraced within the corporate boundaries. Pond, Public Utilities, sections 3-7; 28 Cyc. p. 267, and authorities cited there. Those functions of a municipal corporation in its capacity as an agent of the state are strictly limited by the statutory provisions granting them. In the exercise of these functions the municipality is an arm of sovereignty, and its powers are strictly construed. This class of functions the city must perform. * * *

We think the city did not have implied power to make a contract for light rates. The grant of power by the legislature to the city to regulate those rates was an exclusion of the power to make a contract for light rates that would suppress or suspend the expressly granted power to regulate. * * *

All doubts must be resolved against the municipality's authority to make such a contract and in favor of the continuance of its governmental power."

A clear and comprehensive statement of this rule defining the rights and liabilities of municipal corporations when engaging in purely business and commercial activities is furnished in the case of *Cook v. Beatrice*, 114 Nebr. 305, 207 N. W. 518, where

⁹ Federal. *Safety Insulated Wire &c. Co. v. Baltimore*, 66 Fed. 140.

California. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

Illinois. *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

Indiana. *Indianapolis v. Indianapolis Gaslight &c. Co.*, 66 Ind. 396; *Vincennes v. Citizens Gaslight Co.*, 132 Ind. 114, 31 N. E. 573.

Louisiana. *New Orleans Gas-*

light Co. v. New Orleans, 42 La. Ann. 188, 7 So. 559.

New Jersey. *Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759.

Pennsylvania. *Commonwealth v. Philadelphia*, 132 Pa. St. 288, 19 Atl. 136.

Washington. *Tacoma Hotel Co. v. Tacoma Light &c. Co.*, 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. 35. *Dillon Mun. Corp.* (5th ed.), § 109, and cases cited in the note.

the court said: "The evidence in this case shows that, in maintaining its electric plant and selling current therefrom, the city of Beatrice was acting outside its governmental functions and corporate duties. The rule is: 'It is no part of the duty of a municipal corporation to engage in a purely business or commercial enterprise. When it seeks and obtains from the Legislature permission to engage in such an enterprise, its act in so doing is entirely voluntary on its part, and, while engaging in such business, it is acting in a purely private business capacity, outside of its functions and duties as a municipal corporation, and is bound by all of the rules of law and procedure applicable to any other corporation or person engaged in a like enterprise.' Henry v. City of Lincoln, 140 N. W. 664, 93 Nebr. 331, 50 L. R. A. (N. S.) 174."

That the municipal corporation in furnishing water for private consumption does so under the same rules as private corporations and may not discriminate in its charges to its customers is well expressed in the case of American Aniline Products, Inc. v. Lock Haven, 288 Pa. 420, 135 Atl. 726, 50 A. L. R. 121, P. U. R. 1927D, 112, where the court said: "When a municipal corporation engages in an activity of a business, rather than a governmental, nature, such as the supply of light or water, which is generally engaged in by individuals or private corporations, it acts as such corporation, and not in its sovereign capacity. * * * The agreement of a city to supply water free of charge is discrimination against other users and void as against public policy. There is no difference in this respect between a municipality dealing in a commodity of a public interest, and a public service company dealing in a commodity of a similar nature."

That a municipal corporation operating a public utility in its proprietary capacity can not discriminate in its own favor any more than a private plant operating in the same municipality, is well expressed in the case of Mapleton, Inc. v. Iowa Public Service Co., 209 Iowa 400, 223 N. W. 476, P. U. R. 1929B, 359: "The incorporated town of Mapleton owns and operates a municipal plant in its proprietary capacity. The result is that this plaintiff in its governmental capacity has within it two public utilities. The question is, may they compete in rates? If so, to what extent? * * * When the owner of a private property devotes it to the public use, as herein, he voluntarily retires from the field of competition, so far as the question of rates is concerned. It is the public, as patron, who is interested in free competition. A municipality is the representative of the public pro

tanto. When it exercises the power of fixing rates, it waives competition and establishes a quasi monopoly. * * * Though the town in its governmental capacity could be deemed as partial to its own child, yet it can extend no discriminating favors thereto. It can impose no rates which are not applicable to both plants. The municipal plant can threaten the defendant with no competition in rates. * * * If this can be lawfully done, then a municipally owned plant must always be at the mercy of the owner of a privately owned plant, when such owner chooses to inaugurate a rate war and to take a loss therefrom. The exercise or existence of such a power is antagonistic to the whole scheme of public service by utility companies, and is inconsistent with the principle of rate regulation. It seems plain enough that the municipal plant must charge the ordinance rate. Why should the statutory mandate speak otherwise to the defendant? Under the literal terms of the statute (section 6143), the rates are fixed for both plants, and each of them is bound to conform thereto. In order to sustain the defendant's position, it would be necessary to add qualification to the terms of the statute to the effect that the rate fixed is a maximum one only. There can be no legitimate construction of the statute to that effect, unless it be necessary to save its constitutionality. Such necessity is not present. * * * The advantage of a monopoly is its economy. Though there be a splitting of this benefit where the business is divided between two franchise holders, the evil of monopoly in unregulated enterprises is wholly avoided by statutory regulation. Though it be true that the town in its governmental capacity has a necessary interest in its own plant, and might therefore be deemed disposed to discriminate against the defendant, in the exercise of its governmental functions, yet it has not done so. The ordinance is applicable alike to both franchise holders. * * * The plaintiff, having exercised its statutory power to fix the rates, owes a corresponding duty to each franchise holder to enforce such rates uniformly and impartially against both. In doing so it is performing its plain public duty. Nor has it any discretion to qualify the requirement of obedience, which the statute makes upon the franchise holders."

The municipality installing electrical wiring to furnish electricity in the homes of its inhabitants as well as water heaters and other electrical appliances is acting in its proprietary capacity for its own private advantage, and is subject to the same laws and entitled to exercise the same rights as private corporations undertaking similar lines of service. This rule is clearly

stated in the case of *Hamler v. Jacksonville*, 97 Fla. 807, 122 So. 220, where the court said: "In this case the appellant sought to restrain the city of Jacksonville from installing electric wiring in private houses for the purpose of furnishing electricity for electric ranges, stoves, and water heaters and other electrical appliances. * * * First, we must recognize that it is a well-established rule that municipalities have two classes of power, one of which is the legislative, governmental, or public power, and the other is proprietary and quasi private; that is, corporate power. Under the former, the municipality may act only as a sovereignty, and, in the exercise thereof, it governs and controls the inhabitants within its jurisdiction. Under the latter, the municipality may act for the private advantage of the inhabitants or for the city itself. With the light of these decisions before us, it is clear that the city of Jacksonville, in performing the work complained of, was acting in its proprietary corporate capacity as distinguished from its governmental capacity, and is therefore governed by the same laws and may exercise the same rights as a private corporation engaged in a similar undertaking. In this the corporation is operating and maintaining a public utility as more or less of a business venture, and the court should not interfere with the reasonable discretion of the properly constituted officers or authorities in the operation of such venture."

§ 6. **Proprietary business powers.**¹⁰—The municipal corporation in contracting for the construction or purchase of plants providing such public utilities as gas, water or electric light, while acting within the scope of its authority as conferred upon it by statutory enactments, either expressly or by necessary implication, is not exercising its governmental functions but is acting in its private business capacity for its own special benefit and the advantage of its citizens and is liable in the same way and to the same extent as a private individual or corporation. The case of *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, decided in 1906, furnished an excellent statement and a pertinent application of this principle. In holding the defendant city liable under its contract to purchase the property of the waterworks company made pursuant to proper legislative authority and by the exercise of the option to purchase provided for in the franchise granted by the city to the plaintiff, the court said: "A city has two classes of

¹⁰ This section of second edition 140, P. U. R. 1923D, 662; Seaman cited in *Uvalde v. Uvalde Elec. &c. v. Big Horn Canal Assn.*, 29 Wyo. Co. (Tex. Com. App.), 250 S. W. 391, 213 Pac. 938.

powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their office because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."¹¹

In the case of *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. 534, 29 A. L. R. 1471, the court defined the two capacities of municipal corporations and the limitation of their power as follows: "The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and insanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education, and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks,

¹¹ *Illinois. Illinois Trust &c. Bank v. Arkansas City*, 76 Fed. 271, 34 L. R. A. 518.

construct sewers, collect refuse, and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. They do not apply as against the state in favor of its own municipalities. We hold that the city can not invoke these provisions of the federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question."

The nature and extent of the power and liability of municipal corporations are well defined in the case of *Newark v. New Jersey*, 262 U. S. 192, 67 L. ed. 943, 43 Sup. Ct. 539, as follows: "The enforcement by the state of the provision of the act imposing upon the city the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the state. In *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. 534, 29 A. L. R. 1471, *supra*, it is held that the imposition of the license fee specified in this act is not a taking of property of that city in violation of the Fourteenth Amendment. The reasons supporting that conclusion apply here. The city can not invoke the protection of the Fourteenth Amendment against the state."

The courts recognize that the service of furnishing a water supply by municipalities to their inhabitants is corporate rather than governmental and that the liability for injury through negligence attaches as in case of other corporations. In the case of *Van Alstyne v. Amsterdam*, 119 Misc. 817, 197 N. Y. S. 570 (affd. in 207 App. Div. 882, 201 N. Y. S. 954), the court said: "There is, however, no longer a question but that a municipal corporation in furnishing a water supply to its inhabitants, is acting in a corporate and not in a governmental capacity, and that in such capacity it is liable for its negligence. *Oakes Manufacturing Co. v. New York*, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N. S.) 286; *Canavan v. Mechanicville*, 229 N. Y. 473, 128

N. E. 882, 13 A. L. R. 1123. * * * The liability of defendant is not based upon any fault in the original construction, or the original plans. It is based on faulty maintenance, and disregard of warnings which were unmistakable and which were clearly recognized but not heeded."

A further definition of the police power and of the right of the city to limit its future use and exercise is to be found in the case of *Watertown v. Watertown Light & Power Co.*, 42 S. Dak. 220, 173 N. W. 739, P. U. R. 1920C, 771, where the court held: "There are two classes of power residing in a municipality, one purely governmental in its nature, the other partaking of administrative or business nature. To the first of these belongs the police power, and in the exercise of such police power a city council can in no manner bind its successors; but a city has full power when authorized either by the constitution of the state or by legislative enactment, to contract for the rendering of public service by individuals or private corporations, and in such contract fix the rates to be charged for such service."

In defining the police power and the two capacities of municipal corporations the court in the case of *Denver v. Mountain States Tel. & T. Co.*, 67 Colo. 225, 184 Pac. 604, P. U. R. 1920A, 238, used the following expression: "One is governmental, legislative, or public; the other is proprietary, commercial, and, in this sense quasi-private. Pond on Public Utilities, section 2. This is equally true, however, of the general assembly. * * * The police power is lodged in the people of the state. It is one of the highest attributes of sovereignty. The exercise of this power is essential to the good order and general welfare of organized society. It is continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. * * * The police power to control public utilities need not be granted or invested in a subordinate agency in express words. It is sufficient if it necessarily arises from, or is fairly implied in, or is incidental to, the powers expressly granted, or is essential to the declared objects and purposes for which the agency was created."

The liability of municipal corporations for negligence in the operation of municipal public utilities is clearly expressed in the case of *Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Black River Falls*, 193 Wis. 579, 214 N. W. 451, as follows: "Where a city engages in a project such as the furnishing of electric light, power, or water for the benefit of its inhabitants, upon a consideration to be paid for such service, the function so per-

formed by the municipality is proprietary and not governmental. *Eau Claire Dells Imp. Co. v. Eau Claire*, 172 Wis. 240, 179 N. W. 2, 819; *West Bend v. West Bend H. & L. Co.*, 186 Wis. 184, 202 N. W. 350. Ordinarily a city engaged in its proprietary capacity 'may exercise such powers as a private concern engaged in a like business exercises.' *Eau Claire Dells Imp. Co. v. Eau Claire*, supra. A municipality therefore may act in a dual capacity, the one being governmental in its nature and the other proprietary. * * * Under these circumstances, a valuable privilege was extended, under the contract, to the city, the benefit of which the municipality accepted. The contract in its terms was extremely just and equitable. Neither the officers of the city nor the public at large had any reason to expect that the railway company would assume an obligation which rightfully belonged to the city, for, had this extension not been constructed, it would have been impossible for the accident referred to to happen, assuming that the occurrence took place as is claimed by the railway company. * * * The contract in question was not an ultra vires contract. It was not one which the municipality could not enter into under any circumstances. * * * The possibility of a liability on the part of the city, on account of an accident like the one herein referred to, was extremely remote. Such an accident might never occur, nor could any one anticipate the damages or the extent thereof to the railway company or to any other person."

§ 7. **Liability of municipality.**¹²—The distinction between the two capacities in which municipal corporations act—the one in which, as an arm of sovereignty or an agent of the state, it is charged with legislative and governmental powers; and the other in which it is a property holder conducting a business enterprise for the private advantage of the city and its citizens—is well stated in the case of *Sammons v. Kearney Power &c. Co.*, 77 Nebr. 580, 110 N. W. 308, 8 L. R. A. (N. S.) 404, decided in 1906, where the court said: "A municipal corporation is an instrumentality of the state for the better administration of government in matters of local concern."¹³ The main purpose of its creation is the exercise of certain governmental functions within a defined area. While it has the power to make contracts and

¹² This section of second edition cited in *Uvalde v. Uvalde Elec. &c. Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662; *Seaman*

v. Big Horn Canal Assn., 29 Wyo. 391, 213 Pac. 938.

¹³ *United States v. New Orleans, Louisiana*, 98 U. S. 381, 20 L. ed. 434.

transact other business not strictly governmental in character, such powers are incidental or auxiliary to its main purpose. * * * In the case at bar we are dealing with an irrigation company—a quasi-public corporation. It is also a governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity it is bound to furnish water from its canal to persons desiring to use it on equal terms and without discrimination. In this respect it stands on the same footing as a railroad company.”

The city of New York in the erection and operation of its rapid transit subway system acts in the capacity of a private business concern rather than as a governmental agency and is accordingly liable in damages to abutting property owners. On this point the court, in the case of *In re Board of Rapid Transit Comrs.*, 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366, said: “In other words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign. * * * Such a use was not within the contemplation of the original owner of the land when he parted with the title thereto for a street, or gave a perpetual right of way over the same for the purpose of a street.”

This principle holding a municipal corporation liable as a private individual or business concern under its contract in the purchase and operation of gas works for the debts contracted in that connection was clearly established by the case, which has long been a leading one on the subject, of *Wheeler v. Philadelphia*, 77 Pa. St. 338, decided in 1875, where the court used the following language: “The most that can be urged is, that the city is acting in a double capacity; in the one, exercising rights of sovereignty, in the other, performing the functions of a private corporation in the manufacture and sale of gas. * * * While it is no part of the ordinary and necessary duties of a municipal corporation to supply its citizens with gas and water, it is nevertheless true that it may lawfully do so. * * * Aside from the trustees, and they amount to nothing in our view of the case, the gas works may be considered as property belonging to the city, and operated, not for the purpose of speculation, but to promote the comfort of the whole body of the people. As their original acquisition and subsequent use were lawful, debts contracted therefor must be paid by the city.”

The distinction between the two capacities of municipal cor-

porations in the operation of a waterworks system for furnishing water for the protection of the public against fire and for supplying water to the inhabitants for their ordinary daily consumption is well expressed in the case of *Huntington v. Morgan*, 90 Ind. App. 573, 162 N. E. 255, 163 N. E. 599, where the court indicated this distinction in the following language: "It is generally held that a municipal corporation, in enacting an ordinance for protection against fire and in the maintenance of a fire department and system of waterworks for that purpose, acts in a governmental capacity in the general interest of the community, and that the municipality is not liable to a property owner for damages caused by fire. Nor is a public utility company, owning and operating a system of waterworks for the furnishing of water to private consumers, and for the protection of the public from fire, under a franchise or contract with the municipality liable to a property owner for loss of property by fire caused by insufficient water pressure. * * * The first purpose, that of fire protection, is clearly a discretionary or governmental act. For the default or negligence of the city's employees in relation to fire protection the city is not liable. However, in supplying water to the inhabitants of the city for daily consumption the well-established rule is that the city is liable on the same principle that a private corporation engaged in the same business is liable."

In refusing liability of a municipal corporation in the operation of a waterworks system for fire losses, either directly itself or by contract with a private corporation, the rule is stated as follows in the case of *Highway Trailers Co. v. Janesville Electric Co.*, 187 Wis. 161, 204 N. W. 773: "It has long been the rule in this state and in most jurisdictions that, in the creation and operation of a waterworks system, for protection against fire and other uses relating to the public health, a municipality is exercising a governmental function, and is not liable to its citizens for want of ordinary care on the part of its agents in protecting property from fire. * * * It is also the rule sustained by the great weight of authority that, when a municipality makes a contract with a water company, whereby the company agrees to furnish water for the extinguishment of fires, a private citizen, who suffers loss by fire through the failure to fulfill the contract, has no right of action against the company. * * * For these and other reasons it is the prevailing rule that a citizen or taxpayer has no such direct interest in a contract between a municipality and a private corporation

for supplying water as to authorize an action, either on the contract or in tort, for failure to furnish water for protection against fire. * * * It proceeds on the theory that, in furnishing electric power to the city for fire protection, the defendant was performing a governmental function, and applies the law governing waterworks companies performing the same duty."

As a member of the Metropolitan Water District a municipality, acting in connection with other municipalities, assumes the same liability as when acting alone for the torts of its agents. This rule is clearly expressed as follows in the case of *Morrison v. Smith Bros.*, 211 Cal. 36, 293 Pac. 53: "If the agents were acting in a governmental capacity, no liability attaches to the corporation, under the elementary rule that the state or its various subdivisions are not liable for the torts of their agents while acting in a governmental capacity. But it is equally well settled that an incorporated city or town is liable for the torts of its agents committed while acting in a proprietary capacity. * * * The other type of public corporation upon whose tort liability this court has already passed is typified by irrigation, reclamation, or drainage organizations, whose main purpose is to assist the state in reclaiming, improving, and aiding the productivity of farm lands. In reference to this type of organization the law is well settled that, subject to certain exceptions not important in this case, they are not liable for the torts of their agents, upon the theory that they are state agencies, performing a governmental function. * * * The final act in the development of this new type of quasi-municipal corporation came in 1927 with the passage of the Metropolitan Water District Act (St. 1927, p. 694), an act closely patterned on the other acts herein mentioned, and permitting the creation of a district which, for all practical purposes, is the same as respondent district. In the case of *Pasadena v. Chamberlain*, 204 Cal. 653, 269 Pac. 630, it was directly held that such a district, for all practical purposes, was a municipal corporation. * * * It would certainly be an anomalous situation if a municipality engaged in a proprietary function, such as running, operating or constructing waterworks, would be liable for the torts of its agents, but if that same municipality should join with other municipalities and organize a municipal utility district it would thereby immunize itself from all such liability. Such a rule does not appeal to our sense of justice nor to our reason. The rule excluding state agencies from liability for tort is an excep-

tion to the general rule which we are not inclined to extend. In so far as liability for tort is concerned, the respondent district is to be governed by the same rules as govern municipal corporations with reference to the same question—that is, respondent is liable for the torts of its agents if said torts are committed while the agents are acting in a proprietary capacity.”

In distinguishing between the private and governmental capacity of municipalities and in defining their liability in the former instances, the rule is well expressed in the case of *Pleasants v. Greensboro*, 192 N. Car. 820, 135 S. E. 321, where the court said: “When it is acting in its business or private and corporate capacity, as in operating a water or light plant or other business function, it is liable for the conduct of its agents and servants to the same extent that any other business corporation would be liable under the same circumstances. *Munick v. Durham*, 181 N. Car. 195, 106 S. E. 665, 24 A. L. R. 538. * * * The distinction between the municipal agencies herein made has been long the settled law of this state, although the line of demarcation sometimes is not easily drawn. The people of the state—the sovereign—(unless restricted by constitutional limitation) through the legislative branch of the state government can by statute give the right of action, but we are here following a long line of unbroken decisions. The demurrer must be sustained.”

The liability of municipal corporations, while acting in their private individual capacity, is expressed in the case of *Oshkosh v. Fairbanks, Morse & Co.*, 8 Fed. (2d) 329, as follows: “In constructing these plants the village acted in its purely private business capacity to supply itself and its inhabitants with lights and water, and its measure of liability is the same as that of a private individual or corporation under like circumstances. * * * We think it obvious there is no legislative intent to cut down the broad and unrestricted power to construct the plants, nor was it intended that the cost should not exceed the authorized bond issue. * * * The legislative restriction is on the amount of indebtedness represented by the bonds, not the cost of the plant. It stops there, and there is no intimation of an intent to limit the power to contract for the plans, and for the machinery and material to be used in construction. In a practical sense reason points the other way; for a city or village might have in hand the necessary funds, great or small, over and above the proceeds of the bond issue,—disregarding now the question of its duty to raise them by taxation.”

§ 8. Powers and liability determined by capacity.¹⁴—This distinction of the two capacities of municipal corporations must necessarily be made and kept in mind not only in defining and fixing the nature and extent of the power of the municipal corporation but also in determining its liability, whether for the negligence of its officers or duly authorized agents acting as such or with reference to its contracts duly executed within the scope of its authority. In its private or business capacity since the powers conferred are for the special benefit and advantage of the municipal corporation as such and as they are only incidentally concerned with the general government of the state, the municipal corporation is generally regarded as having the same powers and being subject to the same liabilities as in the case of a private corporation or individual.

In defining the power and liability of a municipal corporation in granting franchises for the supply of public utility service to itself and its inhabitants and in holding that the rule of law is the same as in contracts of private concerns, the court expressed this rule as follows in the case of *Tulsa v. Oklahoma Natural Gas Co.*, 4 Fed. (2d) 399: "The franchise in question was entered into between the city of Tulsa and the grantors of the Oklahoma Natural Gas Company in 1903, under the authority of certain statutes of the state of Arkansas placed in effect in the Indian Territory by an Act of Congress of May 2, 1890. * * * And section 755: 'For the purpose of providing water, gas or street railroads, the mayor and council may contract with any person or company to construct and operate the same, and may grant to such person or company for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose or purposes.' * * * That the franchise in question is a contract entered into under the proprietary power of the municipality there is little doubt. Such is the construction placed upon similar contracts under the sections of the statute above set forth. * * * There is a clear distinction between those powers of a municipality which are governmental in their nature and which the sovereign can not surrender, and those under which the city acts in a proprietary capacity for the purpose of securing to its citizens certain benefits for which any private individual might contract. * * * The Oklahoma Supreme Court has held

¹⁴ This section of second edition cited in *Seaman v. Big Horn Canal Assn.*, 29 Wyo. 391, 213 Pac. 938.

This section of third edition cited in *Mt. Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355.

* * * that such a contract as herein involved, in passing upon a similar ordinance, made under the same statute involved in this consideration, that the Sapulpa franchise was a contract and as such governed by the same rule of construction as any other contract between individuals or private corporations (*Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okla. 347, 97 Pac. 1007).

* * * Since the highest court * * * definitely held that the city of Tulsa in granting the franchise was acting in its business or proprietary capacity, the acceptance of the franchise by the grantees constituted a valid enforceable contract for the term of years provided for in the franchise. At the time the contract was entered into, the sovereign was not attempting to exercise regulatory powers over such a transaction by regulating rates, and it seems clear that Congress in extending the sections of the Arkansas laws into the Indian Territory was not attempting to confer upon the municipality the power in its * * * proprietary capacity to contract with any proper person or corporation for the purposes of supplying the inhabitants of such municipality with gas for fuel and lighting. In view of the fact that the municipality was vested with the power of granting the exclusive privilege for such purposes for a reasonable number of years, it seems to follow that, under this power such municipality was vested with the authority to fix the compensation which its inhabitants were to pay for gas to such person or corporation receiving so valuable a grant. I am therefore clearly of the opinion that the United States Congress, in extending the applicable sections of the Arkansas statute in force in the Indian Territory, authorized the city of Tulsa to contract with the defendant herein, or its grantors, to supply the inhabitants of the city with gas for a period of twenty-five years, and that the contract was executed by the city in its proprietary or business capacity, and that such contract would still be binding on the parties but for the fact that the state, by and through the Corporation Commission, has abrogated the rate provision with the consent of the gas company. * * * This appears to be the rule for the reason such municipalities are always subject to the control of the state. The state may revoke, enlarge, or set aside the acts of its own municipalities. The result of this well-established rule is that the contract in question was modified as to rates by the order of the Corporation Commission, with the consent of the gas company, and such modification is binding on the city."

Although extending its public utility service beyond its limits, the city is not, because of that fact, subject to the regula-

tions of the public service commission as is clearly decided in the case of *Public Service Commission v. Kirkwood*, 319 Mo. 562, 4 S. W. (2d) 773, for, as the court said: "Defendant, city of Kirkwood, in St. Louis county, is a city of the fourth class, owning and operating its water system. * * * In 1923 defendant began serving water outside its city limits to the district known as Meramec Highlands, St. Joseph's College, Woodbine Heights, and Woodbine Heights subdivision and property adjacent thereto. Since the date of the decree of the circuit court of St. Louis county in this case, the properties of the customers above mentioned have been annexed to and now form a part of the city of Kirkwood. Consequently, the Public Service Commission does not now claim that the defendant is required to secure a certificate of public convenience and necessity as to residents whose land has been brought within the city limits by annexation. * * * Section 9079 authorizes and empowers cities to own and operate waterworks. Section 9083 authorizes and empowers cities owning waterworks to supply water to other municipal corporations and persons and private corporations beyond the limits of such city, and to enter into contracts for such time and upon such terms and under such rules and regulations as may be agreed upon by the contracting parties. The General Assembly in 1913 enacted what is called the Public Service Commission Act. Its general object is to regulate public utilities. We see nothing in the act having the effect of repealing section 9079 or 9083. Section 10425, subd. 7, however, subjects a municipality supplying water beyond its corporate limits to the supervision of the commission as to service and rates. * * * On the one hand, it acts in its sovereign or governmental capacity, for which it may not be called to account; on the other, while acting within its proprietary or municipal capacity, it may be said to act as a private enterprise and therefore becomes responsible as such, even though the emoluments redound to the public benefit. *Riley v. Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915D, 748. Thus, while operating a waterworks and supplying water, it is clear that it is acting in its proprietary capacity. * * * We are of the opinion that the Public Service Commission Act neither expressly nor impliedly authorizes or empowers the commission to require a municipality to obtain a certificate of convenience and necessity to supply water to persons and private corporations beyond its limits."

In contracting for the lighting of the streets, a municipality is exercising its proprietary and business powers and is free to

make its own terms and conditions for such service. In distinguishing between the two capacities of a municipal corporation and in holding that the city has the same powers as other private corporations rendering such service, the court expresses the rule as follows in the case of *Chrysler Light & Power Co. v. Belfield*, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426: "In contracting for the lighting of its streets a city acts in a quasi-private or proprietary capacity and exercises its business powers; in regulating rates, it exercises legislative and governmental powers. 3 Dillon, Mun. Corp. (5th ed.) § 1303; 4 McQuillin, Mun. Corp., § 1717 et seq.; *Reed v. City of Anoka*, 85 Minn. 294, 88 N. W. 981; Pond, Public Utilities (3d ed.), section 5 et seq. In so far as the franchise in question here stipulates a definite price at which the electric light company agrees to furnish electric current for lighting the streets of the city, it constitutes a contract between the city of Belfield and the plaintiff utility company. In making such contract the city was not acting as an agent of the state, but was acting for and in the interest of the city as a legal personality. Pond, Public Utilities (3d ed.), pp. 16, 17. * * * We fail to find in the Public Utilities Act any language indicative of a legislative intention to confer any authority upon the board of railroad commissioners to interfere with the rates for electric current to be furnished by an electric light company to a city, where such rates are fixed by contract in the franchise granted by the city to the electric light company. * * * This right of franchise granted to the plaintiff in 1902 was a right of value, a right of contract. Pond, Public Utilities, section 114; McQuillin, Municipal Corporations, vol. 4, sections 1617-1636. The franchise so granted constituted a contract. * * * The city had the right to exact a charge for the use of its streets * * * or as a consideration for the franchise."

A municipal corporation, contracting for certain excavation work in connection with its waterworks system, was held liable the same as a private corporation because it was acting in a proprietary and not in a governmental capacity in the case of *Maney v. Oklahoma City (Okla.)*, 300 Pac. 642, the court expressing the rule as follows: "This contract should receive the same construction as contracts between individuals. * * * Upon the discovery of the rock, which was a surprise to the defendant city's engineer in charge of the work, the contractor, and the defendant city, it had to be excavated. The work was done by the contractor, and the city received the benefit, and

the city by its action waived written demand for extra pay. The city, in erecting its waterworks system, was acting in a proprietary capacity and not in a governmental capacity, and its contracts are governed by the same rules as contracts made between individuals. A city is authorized by the Constitution of Oklahoma to engage in business, and, when so engaged it is subject to the same rules of law as any other corporation engaged in like business. * * * In the case at bar, the plaintiffs were required to complete said contract by the city engineer, and, under the contract, they were compelled to finish the project. The defendants were responsible for their acts in inducing the plaintiffs to bid upon the work by the positive representation that there was no rock to be encountered except in negligible quantities. * * * In the case at the bar the undisputed proof showed that the bidders did not have sufficient time to make their own borings and that they relied upon the defendant city's borings and soundings. * * * Under the undisputed facts adduced in the trial of the case and the law applicable thereto, we hold that the defendant city was clearly liable for the extra work performed by the contractor, to wit, the excavation of the rock, and that the only question that should have been submitted to the jury was the reasonable value for the excavation of the rock."

The distinction between a municipal and a privately owned public utility with reference to the right of the former to abandon service which is unprofitable is clearly set out in the case of *State v. Seattle*, 154 Wash. 475, 282 Pac. 829, where the court expressed the rule as follows: "This action was brought to compel the city of Seattle to continue to furnish street car service upon a particular street for a distance of two blocks, or about 1,320 feet. The cause was tried to the court without a jury, and resulted in a judgment dismissing the application, from which the relator appeals. * * * It will be noticed that this statute gives to the city full power and authority to regulate and control the use and operation of the street car system. There is nothing in the statute which requires the city to furnish service upon all parts of the system which was taken over by it. * * * It is argued by the appellant that, if the judgment is not reversed, the court will have one rule for public utilities when privately owned and another when owned publicly or by municipal corporations. In the *Woody* case¹⁵ it was

¹⁵ *Woody v. Seattle*, 118 Wash. 163, 203 Pac. 59.

expressly stated that a public corporation was in a 'different position from a private corporation' with respect to the abandonment of service by a public utility. We see no material distinction between the present case and that case. * * * As pointed out, the city of Seattle took the street car system free from any of the franchise obligations of the prior owner. If the appellant's position were sustained, it would mean that the city could not at any time or under any circumstances abandon any part of its system, if such abandonment would be a material inconvenience to the patrons of that portion of the system, even though operated at a loss. If the system were owned and operated by a private corporation, then the question of whether it could abandon any portion of its service would be a matter for the state department of public works to determine. There is nothing in this case to show that the city was acting arbitrarily or capriciously, and we express no opinion upon the question as to what the result would be if the city were so acting."

The liability of a municipal corporation to continue the operation of public utilities at a loss is clearly distinguished from that of a private utility rendering such service under such conditions. As deficits arising under such conditions could only be met by taxation, the city is not required to raise funds in this manner but is permitted to discontinue the service. In the case of *Wylde v. Seattle* (Wash.), 299 Pac. 385, the court said: "It was the contention of appellant that the operation of that portion of the railway system lying south of the city limits from January 1, 1922, to October 31, 1928, had resulted in a loss of over \$125,000, and that this part of the railway could not be operated save at a substantial loss. We are satisfied that appellant made a sufficient showing along this line, and that its contention as to the operating loss above referred to is substantially correct. No proposition looking to the acquisition or operation of the electric line was ever submitted to the voters of the city of Seattle for adoption or rejection, and the city contends that for this reason funds raised by the city from general taxation can not be appropriated to the payment of any deficit arising from the operation of the railway. The city also contends that it has no other funds available for the absorption of such deficit. It is admitted that between four and five thousand people reside in the district served by the railway, and that the district has to some extent been settled because of the existence of the railway, and that its continued operation is

convenient to the people dwelling along or near its line. * * *

In considering the question here presented, there must be borne in mind certain fundamental distinctions between the operation of a public utility by a municipality and such operation by a private person or corporation. Many courts have held that a private corporation will be by the courts, in proper cases, restrained from abandoning certain operations of its utility, even though such operations result in a loss (*Ft. Smith L. & T. Co. v. Bourland*, 267 U. S. 330, 45 Sup. Ct. 249, 69 L. ed. 631), whether a transportation company or one for the distribution of water or electric current. * * *

On the other hand, if courts require municipal corporations to continue the operation of public utilities, even though conducted at a loss, such action by the courts necessarily includes the requirement that money to cover deficits be raised either by general taxation, special assessments, or by appropriation from some fund in the possession of the municipality. It may be assumed at the outset that courts will be loath to interfere with the domestic affairs of municipal corporations, and, particularly, to require, against the expressed will of the municipal authorities, the rendition of public service, having reference to proprietary rather than governmental functions, when it appears that the giving of such service results in a financial loss to the municipality. Such an order should be entered only where it clearly appears that the law requires such action. * * *

This court has also held that it is not within the power of a city to divest itself by any franchise grant of its governmental police power, the exercise of which is necessary for the public welfare and the preservation of public safety. *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661. In the case last cited it was held that a provision in a street railway franchise requiring that cars be run two round trips a day fixed the minimum service only, and that the city council could at a later date require a much more frequent service, and that an ordinance requiring such service did not impair the obligation of the franchise contract. * * *

It must be remembered that the record now before us discloses that respondents will not, by the abandonment of the electric railway, be left without transportation facilities, the record merely showing that the continuance of service by the railway will add to their convenience and render their property more accessible, and consequently more valuable. * * *

Under the rule laid down by the foregoing authorities, it clearly appears that appellant may abandon the railway, unless it is prevented from so doing because of some

obligation resting upon it by reason of the conveyance to the city of the county franchise and the ordinance by which the assignment thereof was accepted. * * * There is, then, no franchise obligation to operate. If the city is bound to maintain service over the line, this obligation rests upon it because of the provisions in the resolution of the board of trustees above quoted, or the conditions of the deed above set forth, taken in connection with the ordinance of the city accepting the gift. The city having operated the railway for approximately fifteen years subsequent to its acquisition thereof, there can be no question as to the good faith of the city in accepting the gift of the line, it being clear that the city has made a bona fide attempt to 'carry on' and furnish transportation to those persons desiring the same."

In the operation of a street railway system the municipality acts in its private capacity and has no power to compel another public utility to install crossings at its own expense, because the municipality is liable for the cost of installation and maintenance of such an improvement. This rule, as well as the reason on which it is based, is well stated in the case of *Vicksburg, Shreveport & Pacific R. Co. v. Monroe*, 164 La. 1033, 115 So. 136, where the court said: "It appears, however, that defendant is a municipal corporation, authorized, by its charter 'to construct, own, operate and maintain within or without the city, and within or without the parish of Ouachita, electric street railways and to supply power to private individuals or corporations for any purpose.' * * * It is clear, therefore, that the operation by the city of Monroe of a street railway is a private undertaking for private gain, and that the position of defendant municipality in the case at bar is the same as that of a private corporation engaged in the same business. While, in the matters affecting the public welfare, the city of Monroe may pass all reasonable ordinances as to the regulation of railroads within its jurisdiction, under the statutes relied upon in this case, yet, quoad its private enterprise, or street railway, defendant municipality does not enjoy the status of a governmental agency, but is governed by the rules applicable to a private corporation. It follows, necessarily, that the city of Monroe is without right to claim, and without power to assert by ordinance, in the present case, the sovereign privilege of regulation as to the railroad owned and operated by plaintiff company, by the imposition upon said company of the compulsory duty of installation and maintenance of the crossings in question at its expense. It is plainly

the duty of defendant municipality to maintain its street railway, a private undertaking, at its own expense, and not at the cost of another railroad operated within the corporate limits. *State of Georgia v. City of Chattanooga*, 264 U. S. 472, 44 Sup. Ct. 369, 68 L. ed. 796."

In the operation of a municipally owned light and waterworks system, the court of North Carolina held that the municipality was acting in its governmental capacity, and was therefore not liable in damages for not furnishing a sufficient supply of water necessary to extinguish a fire. While the court said that there was no liability for such failure in the absence of a statutory provision to that effect, as there was a statutory provision in this case denying any such liability there could be no question about this decision, for, as the court expressed it in the case of *Mabe v. Winston-Salem*, 190 N. Car. 486, 130 S. E. 169: "It is conceded that the defendant, city of Winston-Salem, which owns a municipal light and waterworks system, and operates the same in its governmental capacity, can not be held liable in damages for a failure to furnish a sufficient supply of either water or light. *Howland v. Asheville*, 174 N. Car. 749, 94 S. E. 524, L. R. A. 1918B, 728; *Harrington v. Greenville*, 159 N. Car. 632, 75 S. E. 849. * * * It is also conceded that the defendant, in the absence of statutory provision to the contrary, is not liable for any damage occasioned by the negligence of its fire department. * * * For the purposes of its creation, a municipal corporation is an agency of the state government, possessing powers, within its limited scope of authority, which, in their nature, are either legislative or judicial, and may be denominated governmental or public. The extent to which it may be proper to exercise such powers, as well as the mode of their exercise by the corporation, within the limits prescribed by the law creating them, are necessarily intrusted to the judgment, discretion, and will of the properly constituted authorities to whom they are delegated; and, being public in their nature, the corporation is not liable, either for a failure to exercise them, or for errors committed in their exercise, unless expressly made so by statute, *Kistner v. Indianapolis*, 100 Ind. 210. A city, therefore, in the absence of statutory provision to the contrary, does not, by building and operating a system of waterworks or by maintaining a fire department, thereby enter into any contract with, or assume any implied liability to, the owners of property to furnish means or water for the extinguishment of fires, and for the breach of which an action in damages may be maintained.

A city may not be sued for loss sustained by fire, where the wrongful act charged was neglect in cutting off water from a hydrant, but for which the fire might have been extinguished, or in failing to keep a reservoir in repair, whereby the supply of water became inadequate, or because the pipes were not sufficient or out of order, or because the officers and members of the fire department were negligent in the performance of their duties. 3 Dill., Mun. Corp., p. 2300. The extinguishment of fires is a function which a municipal corporation undertakes in its governmental capacity, and in connection with which, in the absence of statutory provision to the contrary, it incurs no civil liability, either for inadequacy in equipment or for the negligence of its employees. 19 R. C. L. 1116; *Scales v. Winston-Salem*, 189 N. Car. 469, 127 S. E. 543, and cases there cited. * * * But the proximate cause of plaintiff's loss was the failure of the fire department of the defendant city to put out the fire; and it is conceded that, if the fire department had not responded at all, or if it had negligently permitted the water mains and hydrants to become and remain choked and clogged with mud, stones, etc. (*Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665), or was otherwise negligent, which resulted in loss to the plaintiff, no recovery could be had. The language of C. S., section 2807, above set out, is that the city 'shall in no case be liable for damages for a failure to furnish a sufficient supply of either water or light.' * * * While it is sufficient to rest our present decision on the statute shielding the municipality from liability in such cases, it is not to be understood that a contrary holding would have followed but for the existence of this statute. The pertinent authorities are otherwise."

That the municipality is liable for the negligence of its employee in cutting off its water supply system to permit the installation of a sprinkler system by one of its customers, because this duty devolved upon the municipality which had exclusive control of the situation, is the effect of the decision in the case of *Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 138 S. E. 503, where the court expressed this rule in the following language: "This sprinkler system was supplied with water from the waterworks of the city of Richmond. * * * A municipal corporation is not liable for the failure to exercise, or for the negligent or improper exercise of, its governmental, legislative, or discretionary powers, nor is it liable for the ultra vires acts of its servants, but for failure to exercise, or for neg-

ligence in the exercise, of those powers and privileges which are conferred upon it for its private advantage, usually called proprietary or ministerial, the municipality is liable in the same manner as a private individual. * * * But the operation of a water department for the purpose of supplying water for domestic and commercial purpose is a private or proprietary right, and for negligence in such operation a municipality is liable in like manner as a private individual. The fact that the water is also used for the extinguishment of fires does not change the result. The cases so holding are too numerous to cite without unduly burdening this opinion. * * * The object of the installation of the sprinkler was the private benefit to be obtained by the plaintiff, and not to aid the city in preventing or extinguishing fires. The work to be done appertained to the city water department, and the negligence proved was that of an employee of that department. The city, therefore, can not defend on the ground that the negligence occurred in the exercise of a governmental power. In the light of the facts stated, it is unnecessary to comment at any length on the position taken by the city that it was not negligent. The use and operation of the water pipes in the city streets were under its exclusive management and control. No one could cut off the water from the city mains except the city or those authorized by it. The city knew, or ought to have known, the location of its pipes. It was asked to cut the water off from the pipe which supplied warehouse A, and the reason for the request was explained to it. It undertook to do so, but failed. * * * The city alone had the right to cut the water off, and, when its employees reported the water had been cut off, the Grinnell Company had the right to rely upon that report."

An interesting application of this rule, denying liability for the negligence of its employee, is that the municipality is not held liable for the failure of the steering gear of its fire truck to operate properly, as found in the case of *Hall v. Jackson*, 30 Fed. (2d) 935, where the rule is as follows: "A Mississippi municipal corporation is not liable for negligence of employees of its fire department in the maintenance or operation of the equipment thereof, for the reason that in maintaining and operating a fire department the municipality is performing a governmental function. *City of Hattiesburg v. Geigor*, 118 Miss. 676, 79 So. 846. The evidence adduced did not tend to prove more than such negligence. * * * So far as appears, the steering gear of the truck had not previously failed to function properly. The

fact that, due to negligence of one or more employees of the fire department, it so failed on the occasion in question, with the result of causing injury to a person lawfully using a street, is not enough to make the city liable in damages for such injury."

§ 9. **Municipal public utilities as business concerns.**¹⁶—Under this distinction it follows that the municipal corporation in the construction and operation of its own waterworks has the same powers which a private corporation would have and enjoy in the same connection on the theory that it is acting in a private business capacity rather than in the exercise of its public governmental functions, which is well illustrated by the case of *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519, decided in 1893, where the court observed: "The business, being one which is impressed with a public use, may, where proper legislative authority is given, be carried on directly by the municipal corporation, or it may be carried on by a private corporation acting under a proper franchise granted to it for that purpose. But, when a municipal corporation undertakes to construct and operate waterworks, it does so in the exercise of its private, and not of its governmental, functions. * * * In separating the two powers—public and private—regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation, quo ad hoc, is to be regarded as a private company. * * * Its power to build and maintain waterworks, and furnish water to its inhabitants for a consideration, is derived from, and is governed solely by, the state; and even though the intention of the city and its officers may have been to furnish water to the people of the city at the mere cost of maintaining and operating the works, and to charge no rates that would result in accumulating a surplus revenue, the city is not bound to persist in that policy, but is at liberty, at any time, to abandon it, and impose reasonable rates and charges, although by so doing a revenue may be realized."

To the effect that the municipal corporation, while acting in the discharge of its private business functions, is liable for the negligence of its officers to the same extent and for the same

¹⁶ This section of second edition cited in *Seaman v. Big Horn Canal Assn.*, 29 Wyo. 391, 213 Pac. 938.

reason that determines the liability of a private concern is illustrated by the case of *Denver v. Davis*, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. 293, 11 Ann. Cas. 187, decided in 1906, where the court said: "In the discharge of its functions a municipality is called upon to perform duties of two classes, the one political and governmental in its character, and the other private and corporate. * * * The rule which determines the liability or nonliability of a municipality in cases of this nature is the character of the duty performed, rather than the department, officer, or agent of the corporation by whom the duty is performed. * * * Nevertheless, it does not follow that the municipality is relieved from liability for the negligence or carelessness of such officer, in the performance of duties imposed upon him by the municipality which are not of a public governmental character. * * * The overwhelming weight of authority is to the effect that the superintendence and care of the streets and alleys of a city, and all that directly pertains thereto, are peculiarly in the class of municipal duties, for the negligence of which the city, in its corporate character, is liable. * * * The record before us warrants the conclusion that in this case the city was acting in its private and corporate capacity, through its health commissioner, for the convenience and benefit of its inhabitants, and not as an agent of the state."

This principle is expressed by the court in the case of *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205, decided in 1907, as follows: "We have accordingly held that where a municipality acts in the dual capacity of furnishing water, gas or other commodity, both for public and private use, under authority of law, it stands upon the same footing as would a private corporation or individual and is alike liable for its neglect or wrongful acts."

In the operation of a street sprinkler for the benefit of its inhabitants for which no charge was made, the municipality was absolved from liability for negligence in the case of *Tillman v. District of Columbia*, 29 Fed. (2d) 442, for as the court said: "It is conceded that municipal corporations possess two kinds of powers and duties, the one being merely municipal for special local purposes and benefits, the other being of a public or governmental character for the general public welfare. 'It is established doctrine that when acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character. A

different rule generally prevails as to their private or corporate powers.' * * * In the instant case it appears that the sprinkler in question was voluntarily established by the District; that it was publicly maintained and operated for the comfort and pleasure of the children of the community, and served incidentally to promote the cleanliness and health of the children who made use of it; that the service was for the common good of all, and was rendered to the public without charge, and that no pecuniary profit or other special corporate advantage resulted from it, nor was any enforced contribution assessed upon individuals particularly benefited by it, by way of compensation for its use. These facts bring the case within the definition of a governmental service as laid down by Chief Justice Rugg, *supra*, which we approve and follow, and accordingly exempt the District from liability for the alleged negligence set out in the declaration."

In contracting for a supply of gas, a municipality is acting under its private, proprietary capacity and has the power to make a contract for a reasonable period of time on such terms and conditions as the parties deem expedient. This rule is well expressed in the case of *Griffin v. Oklahoma Natural Gas Corp.*, 37 Fed. (2d) 545, as follows: "The grant of a right to maintain and operate public utilities within a municipality and to exact compensation therefor is a franchise. * * * Grants of the right or privilege to use public streets for the purpose of maintaining and operating railroads, electric light power lines, system of waterworks, gas pipe lines and the like, are franchises. * * * We think that the context clearly shows that the word 'franchise' as employed in section 14-1701, *supra* [Rev. Stat. of Kans. 1923], means a special franchise to establish and maintain a public utility, to use the public streets therefor and to collect compensation for services, and not an ordinary contract to purchase gas, such as the contracts involved in the instant case, which are expressly authorized by the provisions of section 12-842 [Rev. Stat. of Kans. 1923]. * * * A city has two classes of powers: One, legislative or governmental, in the exercise of which it acts as a sovereign; the other, proprietary or business, in the exercise of which it acts and contracts for the private advantages of the city and its inhabitants. In the exercise of powers which are strictly governmental, the officers of the city may make no grant or contract which will bind the municipality beyond the terms of their offices, because they may not lawfully circumscribe the legislative powers of their suc-

cessors. But, in the exercise of the business powers of a city, its officers are limited by no such rule and they may lawfully exercise these powers in the same way and they are governed by the same rules as a private individual or corporation. *Tuttle Bros. & Bruce v. Cedar Rapids* (C. C. A. 8), 176 Fed. 86, 88; *Illinois T. & S. Bank v. Ark. City* (C. C. A. 8), 76 Fed. 271, 282, 34 L. R. A. 518. The contracts in the instant case are valid, if the period of their duration is a reasonable one under the existing facts and circumstances. *Omaha Gas Co. v. City of Omaha* (D. C. Nebr.), 240 Fed. 352. It is manifest that, in order for the city to obtain a favorable contract for the purchase of gas, it would have to enter into such contract for a substantial period, otherwise no gas company would be justified in making the necessary expenditure for facilities required to furnish such gas. We think that the contracts in the instant case were for a reasonable period and within the power of the city officials. * * * We think, in view of the expenditure necessary to be made by the Oklahoma Corporation and its predecessors to furnish gas to the city and the fact that the city was the only customer for such gas at Iola, an exclusive contract for a period of five years was reasonable. * * * A contract to furnish such gas, as shall be required or consumed by an established business, is a contract to furnish an ascertainable quantity of gas and is valid. * * * The provisions in the contracts exempting the Kirk Company and its successors from failure to furnish gas due to causes beyond its control, did not render the contracts void for want of mutuality. * * * We conclude that the contracts were not void for want of mutuality. * * * In the instant case, the contract dealt with a commodity not readily obtainable or salable in a general market. *Southwest Pipe Line Co. v. Empire Natural Gas Co.*, supra, page 258 of 33 Fed. (2d). The Oklahoma Corporation had expended large sums of money to enable it to fulfill its contracts with the city and to enable it to deliver the gas at Iola. The city was the only wholesale customer for such gas in Iola. The Oklahoma Corporation had no franchise and could not dispose of such gas at retail in Iola. The contracts provided for future delivery over a period of approximately two years and nine months beyond the date when this suit was commenced. The damages for such future period would be exceedingly difficult of ascertainment. Such being the facts, it is our opinion that the Oklahoma Corporation did not have an adequate remedy at law."

That the city of New York in the operation of a radio station

exercises its private and not its governmental powers, and is therefore subject to the same regulation as are private corporations in rendering radio service, is the effect of the decision of the case of *New York v. Federal Radio Commission*, 36 Fed. (2d) 115, 50 App. D. C. 129, where the court says: "It is true that appellant is a municipal corporation, but in the operation of its radio station it exercises private, and not governmental, powers, and accordingly is not acting as a municipal corporation but as a corporate legal individual. *Vilas v. Manila*, 220 U. S. 345, 356, 31 Sup. Ct. 416, 55 L. ed. 491; 43 C. J. 182, 183. Moreover, even if station WNYC is partly used for governmental purposes, the use is nevertheless subject to the regulatory control exercised over the national broadcasting system which is vested by statute in the Federal Radio Commission."

An excellent statement of the distinction between the governmental and proprietary capacities of municipal corporations and of their liability while acting in the latter capacity in operating their municipal public utility plants is furnished by the court in the current case of *Logansport v. Public Service Commission (Ind.)*, 177 N. E. 249, 76 A. L. R. 838, P. U. R. 1931E, 179, as follows: "A city in the operation of an electric light utility, selling service to the public, acts in its private business capacity and not in its governmental capacity, regardless of whether its power to so act is inherent, implied or is granted by statute. The dual capacity or twofold character possessed by municipal corporations is: (1) Governmental, public, or political; and (2) proprietary, private, or quasi private. In its governmental capacity a city or town acts as an agency for the state for the better government of those who reside within its corporate limits, and in its private or quasi private capacity it exercises powers and privileges for its own benefit. *Holmes v. Fayetteville* (1929), 197 N. C. 740, 150 S. E. 624, P. U. R. 1930A, 369; *Scales v. Winston-Salem* (1925), 189 N. C. 469, 127 S. E. 543. When a municipal corporation engages in an activity of a business, rather than one of a governmental nature, such as the supply of light or water or the operation of a railroad which is generally engaged in by individuals or private corporations, it acts as such corporation and not in its sovereign capacity, *American Analine Products v. Lock Haven*, 288 Pa. 420, 135 Atl. 726, 50 A. L. R. 121, P. U. R. 1927D, 112; *New York & Q. Electric Light & Power Co. v. New York*, 221 App. Div. 544, 224 N. Y. Supp. 564, P. U. R. 1927E, 788, and a city operates a municipally owned utility plant in its proprietary capacity as a private enterprise

subject to the same liabilities, limitations, and regulations as any other public utility. *Mapleton v. Iowa Public Service Commission*, 209 Iowa 400, 223 N. W. 476, 68 A. L. R. 993, P. U. R. 1929B, 359."

Having in mind then this distinction of the two capacities in which a municipal corporation may act—the one governmental and public in which as an arm of sovereignty or an agent of the state it is charged with legislative and governmental powers, and the other in which it is a property holder and a business proprietor conducting enterprises or contracting for their service from another for the private advantage of the city and its citizens—it is apparent that this treatise on municipal public utilities is primarily concerned with the municipal corporation acting in the latter capacity as a business concern.

CHAPTER 3

CONSTRUCTION OF MUNICIPAL CHARTERS

Section	Section
15. Reasonable construction.	19. Limitations of fraud and ultra vires.
16. Power and discretion limited only by fraud or abuse.	20. Power to dispose of surplus capacity.
17. Power by implication.	
18. Liberal construction.	

§ 15. **Reasonable construction.**—In construing municipal charters only such strictness is observed as gives effect to every power clearly intended to be conferred on municipal corporations and every power necessarily implied in order to permit of the complete exercise of the powers granted. While the sphere of their activity is necessarily confined to the limits prescribed by the law creating them, within these limits their action is favored by the courts, and powers intended to be conferred will not be defeated or impaired by a strict construction of the charter of the municipal corporation by which such powers are granted.¹

§ 16. **Power and discretion limited only by fraud or abuse.**²—The rule of law is well established that the discretion of municipal corporations, within the sphere of their powers and particularly their private powers, is absolute and not subject to judicial control, except in cases where fraud is found or where the power or discretion is being grossly abused to the oppression of the citizen. In its private commercial capacity while acting primarily as a business concern, the powers conferred on a municipal corporation are for its own special benefit and advantage. The interest of the state is secondary and incidental, for the main purpose is to benefit the particular locality incorporated by increasing the opportunities and extending the advantages of its citizens. Recognizing this to be the principal object in the creation of such corporations and the sole purpose of endowing them with such commercial and proprietary powers as permit

¹Smith v. Madison, 7 Ind. 86; Ohio St. 472, 117 N. E. 953, and Kyle v. Malin, 8 Ind. 34.

²This section (§ 11 of second edition) cited in Butler v. Karb, 96 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711.

them and their citizens to enjoy the benefits of municipal public utilities, the courts permit and favor the exercise of the fullest discretion in the enjoyment and administration of such powers which are consistent with the general object of their grant and the best interests of all parties concerned who are intended to be benefited by such advantages.

The discretion of a municipal corporation in the exercise of its powers is as wide as that enjoyed by the general government and is to be exercised in accordance with the judgment of the authorities in charge of the municipal corporation as to the necessity or expediency of each particular subject when it arises. The legislature is one of the co-ordinate branches of our state government and within its sphere is supreme and so is the municipal corporation within its prescribed limits, whether in the sphere of legislation or in the exercise of discretion with reference to its proprietary interests. The judiciary has little more right or power to interfere with the acts of one than of the other. In all cases where the municipal corporation or its authorized agents or officers act within their powers or exercise discretion granted them expressly or by necessary implication in order to give effect to powers expressly granted, the courts will not interfere unless fraud is found or the power or discretion vested in them is being grossly abused by their action.³

³ United States. *Vicksburg, Mississippi v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. 762.

Federal. *Ft. Scott, Kansas v. Eads Brokerage Co.*, 117 Fed. 51; *Los Angeles Gas & Co. v. Los Angeles, California*, 241 Fed. 912, P. U. R. 1917F, 833, *affd.* in 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76.

Alabama. *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Arkansas. *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 96 S. W. 622; *Southwestern Tel. & T. Co. v. Wayne*, 86 Ark. 548, 111 S. W. 987.

California. *Marin Water & Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767.

Colorado. *Denver v. Mountain States Tel. & T. Co.*, 67 Colo. 225, 184 Pac. 604, P. U. R. 1920, 238; *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.

Connecticut. *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475.

Georgia. *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199.

Illinois. *Warren v. Chicago*, 118 Ill. 329, 11 N. E. 218.

Indiana. *Indianapolis v. Indianapolis Gaslight & Co.*, 66 Ind. 396; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. 185; *Vincennes v. Citizens Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Pittsburgh, Cincinnati, Chicago & Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; *State v. Stickelman*, 182 Ind. 102, 105 N. E. 777; *Rockebrandt v. Madison*, 9 Ind. App. 227, 36 N. E. 444, 53 Am. St. 348.

Iowa. *Des Moines Gas Co. v. Des*

That the power of municipal corporations of a business character vests in the corporations the necessary control and discretion with regard to their action or power to provide or contract with another for their supply of gas was well expressed by the early leading case of *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756, decided in 1876, as follows: "Within the sphere of their delegated powers municipal corporations have as absolute control as the general assembly would have if it never had delegated such powers and exercised them by its own laws."⁴

* * * The discretion of such corporations within the sphere of their powers is as wide as that possessed by the government of the state.⁵ And discretionary powers are to be exercised according to their judgment as to the necessity or expediency of any given measure.⁶ * * * The fact that the ordinance sought to be enjoined amounts to a contract with another gas

Moines, 44 Iowa 505, 24 Am. Rep. 756.

Kansas. *Columbus Water Co. v. Columbus*, 48 Kans. 99, 28 Pac. 1097, 15 L. R. A. 354; *State v. Hiawatha*, 53 Kans. 477, 36 Pac. 1119.

Kentucky. *Henderson v. Young*, 119 Ky. 224, 26 Ky. L. 1152, 83 S. W. 583.

Louisiana. *Conrey v. Waterworks Co.*, 41 La. Ann. 910.

Massachusetts. *Spaulding v. Lowell*, 23 Pick. (40 Mass.) 71.

Michigan. *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

Minnesota. *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24.

Missouri. *Fruin-Bambrick Constr. Co. v. St. Louis Shovel Co.*, 211 Mo. 524, 111 S. W. 86.

New Jersey. *Thropp v. Public Service Elec. Co.*, 83 N. J. Eq. 564, 91 Atl. 318; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24.

New York. *Gamble v. Watkins*, 7 Hun (N. Y.) 448; *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; *New York v. Brooklyn City R. Co.*, 232 N. Y. 463, 134 N. E. 533; *Sun Printing & C. Assn. v. New York*, 8 App. Div. (N. Y.) 230, 40 N. Y. S. 607, 75 N. Y. St. 1, affd.

in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788.

North Carolina. *Asbury v. Albe-marle*, 162 N. Car. 247, 78 S. E. 146, 44 L. R. A. (N. S.) 1189.

Ohio. *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953, P. U. R. 1918E, 470; *Travelers Ins. Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900, 32 A. L. R. 711.

Oregon. *Avery v. Job*, 25 Ore. 512, 36 Pac. 293.

Rhode Island. *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648.

South Dakota. *Watertown v. Watertown Light & C. Co.*, 42 S. Dak. 220, 173 N. W. 739, P. U. R. 1920C, 771.

Texas. *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81; *Uvalde v. Uvalde Elec. & C. Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662.

Virginia. *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. 822.

Washington. *Blade v. LaConner* (Wash.), 9 Pac. (2d) 381.

Wyoming. *Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677.

⁴ *Heland v. Lowell*, 3 Allen (85 Mass.) 408; *Taylor v. Carondelet*, 22 Mo. 110.

⁵ *St. Louis v. Boffinger*, 19 Mo. 15.

⁶ *Kelley v. Milwaukee*, 18 Wis. 85.

company by no means deprives it of its legislative character. These corporations must be permitted to promote the welfare of the inhabitants thereof in their own way, so far as the form their respective ordinances shall assume is concerned. Suppose the city had determined to put in gas works, to be owned and controlled by the city, and thereby supply the public lamps and buildings with gas, and by ordinance so provided; could such an ordinance be enjoined, or would this have been rightful legislation? And because the city chose by ordinance to contract with some one to do the same thing, does that make it wrongful?"

That the municipality may carry liability as well as fire insurance as an ordinary business precaution against such a liability when acting in its business capacity is the logical holding of the court. In an Ohio case⁷ it was said: "The controlling question in this case is whether a village in the state of Ohio has the power, through its board of trustees of public affairs, to contract with an insurance company to insure itself against liability to members of the public on account of injuries or death caused by the maintenance and operation of a municipal electric light and power plant and lines. * * * When a municipality is engaged in operating a municipal plant, under an authority granted by the general law, it acts in a business capacity, and stands upon the same footing as a private individual or business corporation similarly situated. What reasonable distinction from the standpoint of economy, can be drawn between fire and liability insurance? Damage from both forms of misfortune very often occurs. In one form of insurance protection to the works is given; in the other, protection to the utility itself, including the business. In each case, procuring insurance appears a wise means of protection against such loss. Such protection would be exercised by an ordinary business man. It has been expressly held that power to maintain a public building includes the power to contract for fire insurance. * * * There being no practical distinction in protecting a business from loss by fire and loss by liability, we consider this case an authority in favor of the power of the village to make the contract."

In defining the attitude of the courts toward an increase of the sphere of municipal activity and in favor of the policy of a liberal construction of municipal charters the court, in the case

⁷ *Travelers Ins. Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711, citing *Pond, Public Utilities* (2d ed.), § 11; 3

Dillon on Municipal Corporations (5th ed.), § 1801; 4 *McQuillin on Municipal Corporations*, § 1801.

of *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953, 955, P. U. R. 1918B, 683, expressed this well-recognized principle as follows: "We regard the principle to be well settled that the private and proprietary powers conferred upon a municipal corporation are to be construed with liberality, to the end that the purpose of the grant may be fully accomplished. As we have seen, the powers so conferred are broad and comprehensive, no terms being used which in the least degree circumscribe or restrict the actions of the city officials in the management and operation of its utilities. Much is left to their judgment and discretion, as indeed seems necessary; for successful and satisfactory management and operation of a city's utilities could not be accomplished if they were hedged about and hampered by detailed, minute, and precise regulations, directions or restrictions, either legislative or judicial. The principle to be here applied is well stated by Pond in his work on Public Utilities, sec. 16."

§ 17. **Power by implication.**—In the construction of municipal charters for the purpose of defining and fixing the nature and extent of the powers of municipalities, whether express or implied, the court concedes to them a wide discretion, as is shown by the case of *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715, decided in 1881, in which the court refused to enjoin the carrying out of a contract for the building of the city hall and said: "But in saying this, we do not assume that it belongs to this court, or any other, to dictate to the city how it shall spend its money. The council must use its own discretion where it will save and where it will spend; and the case must be a very clear one, and the subterfuge very plain, before that discretion can be regarded as having been exceeded so as to show an excess of power under a pretense of keeping within it. It is not the business of courts to act as city regulators, and unless the authority of the representatives of the citizens has been exceeded, their action can not be interfered with merely because it may not seem to other persons to be as wise as it might be. If cities were new inventions, it might with some plausibility be claimed that the terms of their charters, as expressed, must be the legal and precise limits of their powers. But cities and kindred municipalities are the oldest of all existing forms of government, and every city charter must be rationally construed as intended to create a corporation which shall resemble in its essential character the class into which it is introduced. There are many flourishing cities whose charters are very short and simple documents. * * * But if we were

to assume that there is nothing left to implication, we should find the longest of them too imperfect to make city action possible."

In the case of *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24, where the action was to recover for water furnished the defendant city under a contract made with ample legislative authority, the court permitted a recovery although it was urged by way of defense that the contract was perpetual in form and void because beyond the power of the city to make. In holding that it had no power to circumscribe the grant in question the court observed that if the ordinance warranting the making of this contract was an act of gross indiscretion, this court could have adjudged it invalid by force of its prerogative to supervise corporations of this class.

In the case of *Columbus Water Co. v. Columbus*, 48 Kans. 99, 28 Pac. 1097, 15 L. R. A. 354, decided in 1892, the defense to an action for water furnished the defendant city being its inability to make an exclusive contract for such service, the court in permitting recovery, observed: "Neither would we apply the rule with the same strictness to municipal corporations that should govern private corporations organized for gain. Courts should be governed by the conditions and circumstances surrounding municipalities, and regard them as branches of the sovereign government. When improved methods are offered, which will give to the city better facilities in the way of water, lights and travel, or in any other manner give to its inhabitants increased safety and protection, the governing power of the city should be free to act, but until such time comes courts should not set aside contracts which have been, in part at least, executed, unless for some good cause."

§ 18. **Liberal construction.**—That the courts favor a liberal construction of the private or proprietary powers granted a municipal corporation is well illustrated by the case of the *Sun Printing & Publishing Assn. v. New York*, 8 App. Div. (N. Y.) 230, 40 N. Y. S. 607, 75 N. Y. St. 1 (affd. in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788), decided in 1896, which was sustained and reinforced in its application by the case of *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054, decided June 29, 1912, both of which cases permit the city of New York to build, maintain, and operate or lease its underground rapid transit system. The progressive spirit of the decision in extending the sphere of municipal activity to meet the needs and contribute to the convenience of the citizens

is as interesting and striking an example of the desire of the court to keep abreast of our civilization as it is a practical illustration of the necessity of their doing so if municipal corporations and their rapidly increasing population are to be permitted to have and enjoy the modern conveniences and more recent inventions. In the course of its decision the court observed that: "In considering this question it must be premised that cities are not limited to providing for the strict necessities of their citizens. Under the legislative authority, they may minister to their comfort, health, pleasure, or education. * * * To hold that the legislature of this state, acting as the *parens patriae*, may employ for the relief or welfare of the inhabitants of the cities of the state only those methods and agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon the fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state. Whenever the question has been considered, it has been universally treated in the broadest spirit. * * * The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need or contribute to the convenience of the people of the city at large. Within that sphere of action, novelty should impose no veto. Should some inventive genius by and by create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want and dangerous the delay? Will it then be said that pure air is not as important as pure water and clear light? We apprehend not."

A further interesting illustration of the spirit of progress which induced the court to recognize the increasing demands and opportunities which come with the progress of civilization in its tendency to change what were at one time regarded as luxuries into necessities is furnished by the case of *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199, where the court held that: "If a city has the right to furnish heat to its inhabitants because conducive to their health, comfort and convenience, we see no reason why they should not be permitted to furnish ice." This court accordingly held that the city had the power in connection with its waterworks system to furnish ice with which to cool the

water as demanded by the climate of certain seasons of the year in that locality in the interest not only of the convenience and comfort of the citizens but for sanitary reasons in the preservation of their health.

These principles are well expressed in the case of *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665, where it is said: "The whole spirit of the law is so far as possible to permit under reasonable restrictions the privilege of self-government. In fact, that it was the intent of the legislature in its grant of powers to municipal corporations to give them the fullest power and utmost freedom of action with reference specially and exceptionally to the securing of such a water supply as might be deemed needful, is clearly manifest from the very terms of the act."

In the case of *Vincennes v. Citizens Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485, this rule of law is laid down as follows: "The making of contracts for the supply of gas or water is a matter, delegated to the governing power of municipalities, to be exercised according to their own discretion; and in the absence of fraud, while acting within the authority delegated to them, their action is not subject to review by the courts. The length of time for which they shall bind their towns or cities depends upon so many circumstances and conditions as to situation, cost of supply and future prospects, that the courts can interfere only in extreme cases and upon reasonable application."

In *Conery v. New Orleans Waterworks Co.*, 41 La. Ann. 910, 7 So. 8, the court said: "If the city had the power to make the contract, and confined herself within the limits of the power, the quantity and kind of water, the price, etc., were matters within the legislative discretion of the city council, and unless there is fraud in the execution of the contract, courts will not inquire into this discretion."

Again in the case of *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24, the court said: "Whether or not a new water plant is necessary is a legislative question and not a judicial one. The court can not substitute its judgment for that of the city council and the voters of the city."

The case of *Henderson v. Young*, 119 Ky. 224, 26 Ky. L. 1152, 83 S. W. 583, also contains a good statement of this principle as well as the reason on which it is founded: "In the management and operation of its electric light plant a city is not exercising its governmental or legislative powers, but its business powers,

and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters."

In *Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, decided in 1911, the court said: "As a municipal corporation may lawfully extend its system of waterworks and provide additional reservoir facilities for the purpose not only of increasing its water supply, but as well for the purpose of improving the method of caring for and distributing the same, and whether, when, and in what manner it shall so do are matters exclusively within its discretion, when properly exercised and in good faith, and may further dispose of any excess of water supplied by the system for other than purely municipal uses, it follows that a bare allegation that a contract by which the municipality has engaged to supply water from such system of waterworks is ultra vires and unlawful is insufficient to justify a court of equity in avoiding it, or in restraining the work of constructing the system or the acquiring or taking of land for that purpose."

The limitation on this doctrine of the liberal construction of the powers of municipal corporations is well stated in the case of *Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76, as follows: "In what way the public peace or health or safety was imperiled by the lighting system of the corporation, or relieved by its removal or change, the court was unable to see, and it is certainly not apparent. The court pointed out that there are several lighting systems in existence and occupy the streets, and that there was no contest, or disorder, or overcharge of rates, or peril or defect of any kind; and therefore concluded that the conditions demonstrated that while the city might install its own system, there was no real 'public necessity' arising from consideration of public health, peace, or safety requiring the city to engage in the business of furnishing light. The court reasoned and concluded that what the city did was done not in its governmental capacity,—an exertion of the police power,—but in its 'proprietary or quasi-private capacity'; and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized, and the difference in attendant powers pointed out, in decisions of this court."

§ 19. Limitations of fraud and ultra vires.—But unless expressly authorized by statute municipal corporations have no authority to furnish entertainment for guests of the corporation at the public expense. In doing this without such authority the courts are of the opinion that there is an abuse of discretion, and that expenses are incurred which the citizens should not be made to pay. This rule is well stated in the case of *Gamble v. Watkins*, 7 Hun (N. Y.) 448, which was an action to recover for meals and lodging, furnished in entertaining a party of representatives of the press, that had been authorized by a resolution of the board of trustees of said village. In refusing recovery the court said: "We think that the defendant had no power to appropriate money for the entertainment of a company of editors visiting the place. This is not a duty for which the municipality was created. It is said that the expenditure has been repaid by the effect on the village of subsequent editorial puffs. But it is not proper for village trustees to hire editors to praise the attractions of the place. If it had been shown that the editors were paupers, then, under the duty of a village to take care of the poor, there might have been some propriety in keeping them from starving."

Again in the case of *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648, the court permanently restrained the payment by the city treasurer of an account incurred in entertaining officers of certain British ships of war while in Newport harbor. "The defense would be more meritorious if the persons in whose behalf it is interposed had any claim on the city for value received. But they have none. The city neither danced at the ball nor feasted at the banquet. It got nothing substantial out of them.

* * * It is well settled that a municipal corporation, when sued directly on a contract which it is incapable of making, can not be estopped from taking advantage of its incapacity because the party suing has acted on the contract in good faith."

These cases then will serve to illustrate the limitations which the courts place on the discretion of the municipality in cases of its abuse in order to protect the citizens. In refusing recovery for services to the city, rendered in good faith, the court shows how far it will go to protect the citizens against an abuse of power by their servants, the municipal authorities, and invokes the well-accepted rule of law which requires the individual to know the extent of the authority possessed by the municipality in contracting with it. And as it is axiomatic that fraud vitiates everything it touches, it follows that where fraud is found

the courts will not respect the discretionary rights of municipal corporations.⁸

§ 20. **Power to dispose of surplus capacity.**—That the attitude of our courts favors the fair exercise of the discretion vested in municipal corporations in connection with powers granted to them, and that such corporations are not limited strictly to their actual needs and demands at any particular time, but that municipalities may by way of anticipation determine their capacity and build for the future, is well established. If the municipal corporation owns buildings and equipment and has employed men to discharge its duties which do not require the entire service of such properties or men, it may contract for their use for private purposes.

The courts generally permit this temporary diversion of forces, lawfully employed by the city for public service, to the performance of private work under contract, but only to the extent that there is a surplus of such forces. This privilege of subletting such excess properties or the use of its surplus forces is granted by the courts in the absence of any express statutory authority for the practical purpose of saving the loss that would result from their nonuser. But authority must always be found in the first instance for the employment of these forces and the acquirement of the equipment for serving the public so that their use for private purposes is only temporary and incidental. A municipal corporation, having in its public buildings rooms which the court held it had the authority to build looking to the future growth and the consequent increased demands for additional rooms, which were not needed for the time being for public purposes, is not obliged to let them stand idle but may realize a revenue by renting them for private purposes.⁹

⁸ Ft. Scott, *Kansas v. Eads Brokerage Co.*, 117 Fed. 51; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. 185; *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81; *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. 822.

⁹ *United States. Joslin Mfg. Co. v. Providence, Rhode Island*, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. 684.

Federal. The Maggie P., 25 Fed. 202; *Pikes Peak Power Co. v. Colorado Springs, Colorado*, 105 Fed. 1; *Riverside &c. R. Co. v. Riverside,*

California, 118 Fed. 736; *Puget Sound International R. &c. Co. v. Kuykendall*, 293 Fed. 791; *Colorado Power Co. v. Halderman*, 295 Fed. 178.

Alabama. Pilcher v. Dothan, 207 Ala. 421, 93 So. 16.

California. Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680, P. U. R. 1916F, 1022; *Miller v. Los Angeles*, 185 Cal. 440, 197 Pac. 342.

Colorado. Colorado Springs v. Colorado City, 42 Colo. 75, 94 Pac.

An interesting illustration and statement of this principle is furnished by the case of *The Maggie P*, 25 Fed. 202, decided in 1885, which was an action for breach of contract in failing to pump water out of a sunken boat and to raise it, that was made by the city of St. Louis which had control of its levees and harbor and was bound to keep its wharf free from wrecks. While observing that a city could not make a contract for the discharge of a purely public duty, the court held this contract valid and the city liable for its breach in the following language: "At the same time, when it has in its possession instrumentalities, and hires employees for the purpose of discharging some public duty, I see no reason why, when the exigencies of public duties do not require the use of those instrumentalities and employees, it may not make a valid contract to use them in private service. Thus, take the fire department. The city, having its engines and firemen, might make a valid contract with me to pump water out of a cellar, and compel me to pay for this service. * * * And, generally speaking, when public duty does not interfere with private service a city may make a valid contract for the use of its instrumentalities in the latter. Now, pumping water out of a sunken boat and raising it is a matter of principally private interest to the owner of the boat. * * * It is also true that there is no authority in any ordinance, etc., specifically empowering any officer of the city to contract for doing this kind of service. But I do not think that is very material, because the testimony shows that the city, through its officers, has been in the habit of making these contracts and receiving com-

316; *Larimer County v. Ft. Collins*, 68 Colo. 364, 189 Pac. 929.

Indiana. *Scott v. La Porte*, 162 Ind. 34, 68 N. E. 278.

Kentucky. *Rogers v. Wickliffe*, 29 Ky. L. 587, 94 S. W. 24.

Louisiana. *Montgomery v. La-Fayette*, 154 La. 822, 98 So. 259.

Maryland. *Gottlieb-Knabe Co. v. Macklin*, 109 Md. 429, 71 Atl. 949, 31 L. R. A. (N. S.) 580, 16 Ann. Cas. 1092.

Massachusetts. *French v. Quincy*, 3 Allen (85 Mass.) 9; *George v. School District*, 6 Metc. (47 Mass.) 497; *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185; *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977, 124 Am. St. 543, 12 Ann. Cas. 1109; *Davis v. Rockport*, 213

Mass. 279, 100 N. E. 612, 43 L. R. A. (N. S.) 1139.

Nebraska. *Bell v. David City*, 94 Nebr. 157, 142 N. W. 523.

New Jersey. *East Jersey Water Co. v. Newark*, 96 N. J. Eq. 231, 125 Atl. 578.

Texas. *Crouch v. McKinney*, 47 Tex. Civ. App. 54, 104 S. W. 518; *Paris v. Sturgeon*, 50 Tex. Civ. App. 519, 110 S. W. 459.

Utah. *Muir v. Murray City*, 55 Utah 368, 186 Pac. 433.

Washington. *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331; *State v. Spokane & I. E. R. Co.*, 89 Wash. 599, 154 Pac. 1110, L. R. A. 1918C, 675.

pensation therefor; and having made that a business, etc., it does not lie in its mouth to say now that there was no officer authorized by ordinance to make this kind of a contract."

The case of *Pikes Peak Power Co. v. Colorado Springs, Colorado*, 105 Fed. 1, offers a good statement of this rule of law, together with the reason upon which it is founded: "But it is equally true that municipalities and their officers have the power and use of all public utilities under their control for the benefit of their cities and citizens, provided always that such application does not materially impair the usefulness of these facilities for the purpose for which they were primarily created.

* * * Where a city has had legislative authority to erect a dam for the purpose of providing waterworks for the city, it might lawfully lease for private purpose any excess of water not required for its waterworks. This is a just and reasonable rule. It is a rule not inconsistent with any principle of law or equity and in accord with that good sense and good business principles which recognize as a public good the growth of two blades of grass where but one grew before, and the conversion of waste to use."

The case of *George v. School District, 6 Metc.* (47 Mass.) 497, decided in 1843, questioned the authority to erect a second story for a hall over the public schoolroom which was to be for the occasional use of the school. In upholding the contract, however, the court observed: "This also was matter of expediency. If the district considered that a hall, or the occasional use of a hall, would be beneficial to the school, we think it was within their power to provide for it, as incidental to the general power to provide a schoolhouse."¹⁰

The same principle is sustained by the Supreme Court of Massachusetts in the case of *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977, 124 Am. St. 543, 12 Ann. Cas. 1109, decided in 1907, permitting certain private uses to be made of a town hall which had been erected with proper authority as an assembly for the inhabitants, the court saying: "The reported facts show a substantial use of Huntington Hall for political rallies, conventions and other public meetings of citizens, although from time to time it had been rented for purposes of amusement and instruction. That the building has been also let for private uses, when not required for public needs, does not affect the general legal purpose."

¹⁰ *Spaulding v. Lowell*, 23 Pick. (40 Mass.) 71.

This principle together with its practical application and the reason upon which it is founded is well defined by the case of *Riverside & A. R. Co. v. Riverside, California*, 118 Fed. 736, decided in 1902, where the defendant city had contracted with the plaintiff railway company for the sale of its surplus electrical power. In sustaining such contract the court said: "The power contracted to be furnished to complainant by said city was, at the date of the contract, surplus power, that is to say, power received by said city under its contract with the Redlands Electric Light and Power Company, and not required by users of light or power other than complainant. * * * Complainant is not in default upon its contract, but defendants have threatened to, and, unless restrained by this court, will sever the connection between its wires and the Redlands' wires, and cut off the Redlands' electricity from complainant, and by so doing, prevent the running of complainant's cars and the operation of its street railway. * * * It was under the conditions above named that the city entered into its contract with the complainant, and, bearing in mind that the acquisition, construction, maintenance, and operation of street railways are among the declared purposes of the city's organization, the conclusion seems to be unavoidable that said contract was within the scope of the city's powers, and its obligations can not be terminated or changed by any subsequent increase in the demand for electrical lighting."

In the case of *Crouch v. McKinney*, 47 Tex. Civ. App. 54, 104 S. W. 518, decided in 1907, the city, having established an electric light plant the capacity of which for the time being was greater than necessary for the lighting of its streets, was permitted to sell the excess or surplus in supplying lights to individual citizens for their private use, the court observing that: "When the city has a surplus of power, after discharging its duty to the public, there seems to be no question of its authority to sell the excess to private citizens. *Nalle v. Austin*, 85 Tex. 520, 21 S. W. 380."

The case of *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316, decided in 1908, permitted the city to dispose of its excess supply of water, and having made a contract to do so, the city was held liable for the faithful performance of such contract and it was not permitted to set up the plea of lack of authority by way of defense.

The limitations placed upon this rule by the courts are suggested by the case of *Gottlieb-Knabe & Co. v. Macklin*, 109 Md.

429, 71 Atl. 949, 31 L. R. A. (N. S.) 580, 16 Ann. Cas. 1092, decided in 1909, where the court said: "This is not the case of a municipal corporation perverting the functions of government by deliberately and indefinitely engaging in business for profit, and entering into competition with its taxpayers, from whom it exacts a license which it does not itself pay. It is but the temporary, casual, and incidental use of unused public property, done in the practice of a public economy to avoid loss of revenue upon such unused public property, and to lighten thereby the general burden of taxation."

In the case of *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130, decided in 1906, an injunction was granted to prevent the defendant city from contracting to furnish water to the adjoining city of Ballard for the reason that the authority of the city was limited to its own territory and that power would not be implied permitting it to supply neighboring cities with water. It does not appear from the case that the contract was for temporary service or that it was limited to the surplus water of the city so that the case serves as an illustration of the proper limitation of the principle in question. The court expressed its decision in the following language: "It thus appears from the foregoing that the power conferred upon the city by the legislature and also by the city charter is limited to the ownership and operation of the waterworks for the purpose of supplying the city 'and its inhabitants with water'. A municipal corporation is limited in its powers to those granted in express words or to the powers expressly granted, and also to those essential to the declared objects and purposes of the corporation. It is a general principle that a municipal corporation can not usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from some statute which expressly or impliedly permits it. The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations. * * * Tested by the above-mentioned principles and by the statutory and charter authority above quoted, the power of the city of Seattle to furnish water from its own plant is limited to the city itself and its own inhabitants."

A striking illustration, however, of the practical reason for extending this principle is afforded by the case of *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331, as follows: "The evidence is that a hydro-electric plant may be operated twenty-four hours a day at practically the same expense as for shorter hours. All

that is required in the operation of the plant is to permit the water to flow through the pipes and penstock onto the turbines. The steam plant will when constructed be auxiliary to the hydro-electric plant on Cedar river which is situated about forty miles from the city. The plan is to carry steam constantly, so as to have power available for lighting the city in cases of emergency. The city will use the surplus steam for power and heat. This surplus the witnesses term a by product. * * * Whether the plant is operated for power or light, the expense will be the same. * * * The plan then adopted has been consistently adhered to, and the policy of the city has been, and is, to extend the lighting system as rapidly as the funds will permit, to furnish the city and its inhabitants with electric lights as cheaply as possible, and to this end it has disposed of its surplus energy for power. The testimony, however, makes it clear that the principal and dominant object of the city has been, and is, to generate and transmit electric energy for lighting purposes."

That public utilities may anticipate their future needs in fixing their capacity for service and that in the sale of their surplus energy they are not subject to regulation by the commission as to rates and service as they are private rather than public is decided in *State v. Spokane & I. E. R. Co.*, 89 Wash. 599, 154 Pac. 1110, as follows: "It has been held that a public service corporation can anticipate its future needs and develop energy reasonably in excess of present requirements. The character of such companies and their relation to the public has been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business and gives such companies no right to assert the sovereignty of the state. * * * It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to any one other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant it can sell at one price to one man and at another price to another. The parties to the contracts are not complaining. If either is not content with the offering of the other, he does not have to contract. He can go his way. But it is not so with appellant when exercising its public function, that is, furnishing something—a necessity—that all are entitled to receive upon

equal terms, under equal circumstances and without exclusive conditions."

A further illustration of the principle of the implied power of municipalities to dispose of surplus capacity is furnished in the case of *Joslin Mfg. Co. v. Providence*, Rhode Island, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. 684: "The provision in respect of furnishing water to water companies within the area defined is not compulsory, but permissive; and leaves the city free to fix terms and conditions. It simply gives the city an opportunity to dispose of water, which, for the time being, it may not need, for compensation—something that is purely incidental to the main purposes of the legislation. No constitutional objection to it is now perceived. * * * That the necessity and expediency of taking property for public use is a legislative, and not a judicial, question, is not open to discussion. * * * Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. *Bragg v. Weaver*, 251 U. S. 58, 64 L. ed. 135, 40 Sup. Ct. 62; *Sears v. Akron*, Ohio, 246 U. S. 242, 251, 62 L. ed. 688, 698, 38 Sup. Ct. 245."

One of the leading cases extending the power of a municipal corporation in permitting it to sell its excess electrical energy outside of its boundaries, so long as such sales do not interfere with the supply of electricity to its inhabitants, was decided by the court of Oregon. In this case the court under statutory authority extends the line of decisions which generally permit of the sale of surplus products of municipal corporations by permitting such sales to be made beyond the city boundaries, and with the limitation that such sale shall not handicap the city in serving itself and its inhabitants, there is no practical reason why the service should not be extended to nonresidents and the city at the same time be permitted to conserve its products and realize a profit on the sale of such energy which may be available after serving all municipal demands including public and private customers and itself. As the court said in the case of *Yamhill Electric Co. v. McMinnville*, 130 Ore. 309, 274 Pac. 118, 280 Pac. 504, P. U. R. 1929C, 346: "That permitting cities to engage in the business of selling light and power outside of their corporate limits, without a central supervision of their activities, will tend to stifle private enterprises, goes without saying. That such a venture, by the city of McMinnville, may have proved financially profitable to the municipal treasury will have a tendency to induce other municipalities to attempt like

ventures, is not improbable. * * * Owing to the fact that no other state has a statute as broad as ours concerning the right of a municipality to dispose of electric energy outside of its boundaries, there is great dearth of authority touching constitutional limitations on such power. * * * When a city owns, maintains, and operates its own water or light plant, it is to be reasonably expected that in the prudent management of its works some excess beyond the natural requirements of the public will arise; that there will be more surplus which will be available for disposal over and above such as it requires for its own purposes and such as its inhabitants can claim by reason of the prior duty which it owes them. With reference to the surplus so arising, the city may contract with private individuals for the private use thereof so long as it does so without affecting the supply which is required for public or quasi-public purposes.

* * * Municipal and private corporations, being artificial entities created by law, have such authority and rights as the law gives them, no more and no less, and, unless a variant classification of them is clearly arbitrary and void of distinction in fact, it must be upheld. That in the long run it may appear that it might have been better policy to have placed municipalities under outside regulation can have no weight with us in interpreting a proposition of law. We deal with the law as it is, not as we may happen to think it ought to be. It is only ambiguity that is in the domain of interpretation, and we find no ambiguity in the statute. * * * It will be noticed that the authority of cities to sell and supply electric energy to consumers outside of their corporate limits was originally granted by the statute of 1911 (c. 80), and now constitutes section 3770, Or. L. [Ore. Code 1930, § 56-2501], which makes no reference to charter powers, and in itself constituted a grant of authority to any city in the state, and has not been directly amended since that time."

In holding that a municipality may provide for the disposition of its surplus water and, in doing so, is liable for the installation of pipes and other connections necessary for the purpose, which is a matter resting in the discretion of the municipal authorities, although they may not undertake to furnish nonresidents except on special terms and conditions, which may differ from those for its own inhabitants, the court of Virginia said in the case of *Mt. Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355: "It is true that the power of a town to establish waterworks is conferred for the benefit of its own citizens, but it is also true and it is to be remembered, that the power to take is not limited to

its present needs. *Miller v. Pulaski*, 114 Va. 85, 75 S. E. 767. For the purposes of this case, and for those purposes only, it may be conceded that the statute in question confers no authority on a town to supply water generally to those who live beyond its corporate limits. * * * These authorities also hold that a city may sell to persons beyond their corporate limits surplus water and power. *Dyer v. City of Newport*, 123 Ky. 203, 94 S. W. 25, 29 Ky. Law Rep. 656; *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276, L. R. A. 1916C, 395; *State v. City of Eau Claire*, 40 Wis. 533; *Green Bay & M. Canal Co. v. Water Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; *Richards v. City of Portland*, 121 Ore. 340, 205 Pac. 326; *Larimer County v. City of Ft. Collins*, 68 Colo. 364, 189 Pac. 929; *City of Henderson v. Young*, 119 Ky. 224, 83 S. W. 583, 26 Ky. Law Rep. 1152; *Paris Mountain Water Co. v. City of Greenville*, 110 S. Car. 36, 96 S. E. 545; *Andrews v. City of South Haven*, 187 Mich. 294, 153 N. W. 827, L. R. A. 1916A, 908, Ann. Cas. 1918B, 100; *Pond on Public Utilities*, section 8. Common sense requires us to hold that a city in the possession of surplus water, lawfully acquired, should not permit it to run to waste when it can be sold at a profit. * * *

"There are cases which hold that, even though a city may sell its surplus power, or water, it can make no connections designed for delivery, and can do business only on a cash and carry basis; that the purchasers must come for what they want and make at their own expense the necessary connections, such as *Dyer v. City of Newport*, and *City of Sweetwater v. Hamner*,¹¹ *supra*. In this last case it was said that, if a city might extend its mains for ten feet, it might extend them for uncounted miles. There is reason in all things. The consolidation of two cigar shops is no combination in restraint of trade. * * * The measure of expense which a town may incur in disposing of its surplus supply of water should be governed by the town's good judgment. That discretion is certainly not abused when the transaction results in a profit to the town, as would be the case here had water been furnished. It follows from what has been said that the town had a right to sell its surplus water, and, as ancillary thereto, had the right to lay pipes (if otherwise authorized) to this end. It also follows that it is liable for necessary expense incurred in so doing. The possibilities of abuse in nowise limit the power. That water through these conduits may at times be improperly sold is a matter which does not concern these

¹¹ (Tex. Civ. App.), 259 S. W. 191.

contractors. * * * The contract, in substance, amounts to this: The town said to the plaintiffs, 'If you will build this main for us, we will pay you for your work and furnish you water,' and it now refuses to pay for the work because it claims that it can not be compelled to furnish water. Mt. Jackson, like most towns in Virginia, has a surplus of all that commodity, except in periods of dry weather, and has the power to furnish it so long as no hardship is inflicted thereby on its own citizens. That bridge has not been reached. This contract, to the extent that it attempts to put these plaintiffs on the same footing that nondomestic users of water in the town stand, is unlawful. The town went beyond its authority in this particular, and so to that extent the contract is ultra vires, but attention is again called to the fact that this is not a suit for water. If the pipe had been laid as a private pipe for the purpose of supplying the plaintiffs' filling station alone, there might be no way to disassociate the laying of the pipe from the uses to which it was to be put. But this is not our case. The town secured the right of way, and required that the pipe placed thereon should be large enough to accommodate other consumers also, and 'T' connections were placed on it for that particular purpose. It is a city main, designed to be used as other city mains are. If this entire contract were ultra vires, plaintiffs could still recover on a quantum meruit. * * * It is a common custom for municipal corporations in Virginia to furnish water to those who live beyond their limits. This is a source of profit to them, contributes to the sanitation of the outlying districts, and indirectly to that of the towns themselves. To discontinue this would, in many instances, be disastrous, and would result in the injury of all concerned without corresponding benefit of any kind to anybody. When to sell and when not to sell must be left, as other matters of business are left, to their sound judgment."

The court of South Carolina permits of the extension of the powers of municipal corporations to contract for the construction of an additional water supply system and for the diversion or use of its surplus supply obtained from such system by the company constructing it. In sustaining its decision, extending the municipal powers for this purpose, the court observes that the city is thereby insured of an additional water supply at a low cost which is available for the city's use in cases of emergency. In the course of this decision the court further observes that the terms of the agreement and the wisdom of the policy are questions entirely within the discretion conferred by the statute

upon the municipality and that its action can not be questioned by the courts in the absence of reasonableness and good faith, for as the court said in the case of *Green v. Rock Hill*, 149 S. Car. 234, 147 S. E. 346: "Both in form and substance the contract is essentially an operative agreement—wherein and whereby the city undertakes to provide for the operation, management, and maintenance of an additional water supply system after construction. To the extent that the contract, prima facie, involves the exercise of the power of taxation by the city that power is to be exercised for the purpose of constructing and operating an additional water system by and for the city—'a public purpose within the power to tax,' which is expressly recognized and sanctioned both by statute and in the fundamental law of the state. * * * Under the foregoing express and comprehensive grant of power from the Legislature of the state, there can be no doubt that the city of Rock Hill, through its electorate and duly constituted city council, has plenary discretionary power to make such disposal, including an outright sale, of the waterworks plant referred to in the contract as it may see fit, subject only to control by the courts upon and in accordance with the well-settled legal principles. * * * In the light of the foregoing interpretation of the measure of the fiduciary obligation imposed upon the municipal authorities of Rock Hill, under the well-settled principles of law above stated, it is clear, we think, that this contract may not be pronounced invalid upon the ground that it contemplates and involves such a donation or diversion of public property to a private use as amounts to a breach of the trust imposed upon the city council to operate, manage, and dispose of the waterworks, about to be constructed, 'for the use and benefit' of the city and its inhabitants. In the answer of the city it is alleged 'that the city by this contract secures the operation, maintenance, and replacement of said additional water supply system at a low cost and under conditions which provide for its continuous operation and availability for the city's use in case of emergency, so that the benefits of such arrangements will inure to all the citizens.' * * * From an examination of the terms and provisions of the contract for purposes of construction, it can not be concluded as a matter of law, either that the contract is an unreasonable business arrangement for the city from the standpoint of dollars and cents, or that the force and effect thereof are to divert public property to a private use and to transfer valuable rights therein to a private business corporation for a grossly inadequate consideration.

Broadly stated, the consideration received by the city is a fixed supply of water delivered to it for the use and benefit of the city's present water supply system and relief from the burden of physical operation and maintenance of the plant and equipment, and the consideration received by the company is the right to use the surplus or excess water derivable from its operation of the waterworks plant and equipment and to empty its sewage into the city's sewers, and certain payments in money to be made by the municipality. Whether the supply of water received by the city is 'adequate and reasonably commensurate with the investment involved,' and whether the cost thereof to the municipality under the terms of the contract is 'lower than would otherwise be obtained' are questions of fact which involve for their determination the exercise of the business judgment of the municipal authorities in the light of knowledge of the cost of material, machinery, labor, power, and other pertinent engineering data, which it is peculiarly within the province of the municipal authorities to obtain and apply. * * * The contract embodies the city's choice of means and methods of operating and maintaining the waterworks within the discretion conferred by the statute, and it can not be held as a matter of law from a construction of the contract that in the exercise of that discretion the city council and electorate have transcended the limits of reasonableness and good faith. It follows that the contentions of the petitioners hereinabove discussed and considered can not be sustained. * * * The contract is valid and binding in all its provisions upon the contracting parties; and * * * the bonds proposed to be issued will constitute valid and binding obligations of the city of Rock Hill."

The court of North Carolina furnishes an interesting case in which municipal corporations are permitted to serve nonresidents with electric current in connection with furnishing such service to itself and its inhabitants. The municipality by contract with a private concern secured the electrical current for the purpose, and while there was no question of disposing of surplus energy, the court in sustaining the municipality in its service to nonresidents indicated the tendency of judicial decisions to extend the sphere of activity and usefulness of municipal corporations beyond their boundaries. This principle is clearly enunciated in the well-considered case of *Holmes v. Fayetteville*, 197 N. Car. 740, 150 S. E. 624, P. U. R. 1930A, 369, where the court said: "Some years ago it made a contract with the Carolina Power & Light Company, which is now in effect,

for the purchase of an electric current for the use of the city and for resale or redistribution within the corporate limits and within adjacent territory, distant not more than three miles from the corporate boundaries. The contract is to continue ten years from September 10, 1924. The company is to supply all the electric power requirements of the city not to exceed certain electrical horsepower. * * * The plaintiff specifically rests his right to relief on two propositions, the first of which is this: A municipality which is not engaged in the manufacture of electricity, but is supplied an electric current from an electric power company, can not engage in the business of selling such electric current to inhabitants outside of the boundaries for its activities outside of its corporate limits in no way contribute to a fulfilment of its municipal functions or duties to the citizens within its boundaries. The powers of a municipal corporation are those granted in express words, those necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation. * * * The dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or quasi private. * * * The excess may be sold, although the city instead of owning the plant, gets its supply by contract. *Riverside Ry. Co. v. Riverside (C. C.)* 118 Fed. 736. In the case before us, the record does not disclose the exercise of the police power or the sale of a surplus current. The direct question is whether the defendant is authorized to sell electricity to persons and corporations outside its limits when the electric current is furnished by the power and light company in pursuance of the contract between these parties. We think there can be no question as to the defendant's right to purchase electricity for its own use and for the use of its inhabitants. Private Laws 1925, c. 28, art. 2, section 1; Pond on Public Utilities, section 54. It is equally clear that without legislative authority the defendant would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city. * * *

At the same session of the General Assembly, C. S., section 2807 was amended by authorizing a city to furnish water and lights, not only to its citizens, but 'to any firm, person or corporation desiring same outside the corporate limits, where the service is available.' * * *

If the defendant should attempt to pledge the faith of the city or to contract a debt or to levy a tax for an enterprise conducted within the designated territory, the tax-

payer would have ample remedy; but, so long as the defendant's action is not in breach of any constitutional provision, we do not perceive why it may not be justified by legislative sanction."

That municipalities may construct plants for providing themselves and their inhabitants with electricity in excess of their present needs without exceeding their authority is the effect of the decision in the case of *West v. Byron* (Md.), 138 Atl. 404, P. U. R. 1927E, 286, where the court said: "Whether the production and distribution of electric current for private use should be by municipal ownership or through private enterprise is a debatable governmental question whose proper solution is no function of the courts. * * * There can be no question that the municipality had the legal right to construct the new plant for its purely municipal purposes and to build in excess of its present municipal needs."

In the conservation of its water supply the state will not allow a water company, selling its plant to a municipality, to require the latter to waste a substantial surplus supply but will permit it to be used where necessary by other municipalities. This principle of the right to dispose of surplus products is established in the case of *East Jersey Water Co. v. Newark*, 98 N. J. Eq. 672, 130 Atl. 557, where the court said: "While we recognize the right of the complainant by virtue of its legislative grant to appropriate the waters in question to public use and to turn them over to the city of Newark, to the extent of 50,000,000 gallons daily, it is manifestly against the policy of the state, the aim of which is to conserve its potable waters for the use and benefit of its inhabitants, that, if there was a surplus of water remaining after the needs of the inhabitants of the city of Newark and the municipalities mentioned in the contract are satisfied, to permit the remaining millions of gallons of water to go to waste, to the detriment and irreparable injury of the inhabitants of other municipalities in the state. No such right as is claimed by the water company was conferred upon it by the legislature, and the attempt to exercise and enforce such claim is clearly beyond its legal power and in direct violation of the public policy of the state."

The municipality may sell its surplus energy in connection with furnishing electricity obtained by contract with a private concern to nonresidents in the same manner and for the same reason as it might make such sales in case it manufactured electric current itself; and in doing so different charges may be

made to those residing outside of the limits of the city because of their location and for the further reason that the liability of the enterprise is municipal and is therefore a burden of the city residents alone. This principle together with the reasons upon which it is founded is well expressed in the case of *Guth v. Staples*, 183 Minn. 552, 237 N. W. 411, as follows: "The city purchases its current from the Minnesota Power & Light Company. We agree with counsel for the plaintiffs, contrary to the contention of the city, that a city of the class stated may sell surplus electric current to those outside the city limits, regardless of whether the city itself manufactures the current or purchases from another. This was the view of the trial court. It is entirely too narrow a view, under the language of the two statutes, that the legislature intended a distinction in the right to furnish electricity outside the city dependent upon whether the city manufactured or bought its current. It appears from the complaint that for several years the city has sold electric current to consumers residing near, but outside, the city limits.

* * * The discrimination is between those residing without and those residing within. * * * That there may be a different charge between residents and outsiders is obvious. The city and its inhabitants have the burden and risk of operating the electric plant. The loss through damage or destruction of the plant by accident or by the elements falls upon the city. The nonresidents purchasing electric service bear no part of it. An accident resulting in personal injury or property damage through the fault of the city is paid by taxes levied upon property of the city—not taxes on outside property. The city suffers from the natural depreciation in value of its plant. The adjacent territory does not share it. For these reasons, and others that perhaps might be assigned, there is justly a difference in rate to residents and to nonresidents, who pay for what they get with no attendant or contingent risks."

In furnishing public utility service to consumers outside of its own territory, a municipal corporation is held to be subject to the same rules and regulations as apply to private public utilities furnishing a similar service, so that the power to fix rates and other regulations for rendering such service is in the state public utilities commission. This statutory rule of regulation is established and well expressed as follows in the case of *Lamar v. Wiley*, 80 Colo. 18, 248 Pac. 1009, P. U. R. 1927A, 175: "In the present case the power rate fixed by the city of Lamar, owner of the public utility, for the town of Wiley, is not a rate fixed for

citizens or inhabitants of the city, but for another municipality, a consumer outside the city, which has no voice in selecting those who fix rates for public service. * * * We therefore hold that where a municipality, as owner of a public utility, furnishes the commodity in question to its own citizens and inhabitants, consumers within the municipal limits, the city itself, through its proper officers, possesses the sole power to fix rates. When a municipality, whether in its operation of its own public utility it acts in its municipal or governmental, or in its proprietary, or quasi public, capacity, or partly in one and partly in the other, and as such furnishes public service to its own citizens, and in connection therewith supplies its products to consumers outside of its own territorial boundaries, the function it thereby performs, whatever its nature may be, in supplying outside consumers with a public utility, is and should be attended with the same conditions, and be subject to the same control and supervision, that apply to a private public utility owner who furnishes like service. * * * On the main proposition involved we think that, when the city of Lamar goes beyond its own boundaries, and furnishes its surplus utility product to the town of Wiley, an outside consumer, the city itself does not have the power to fix the rates for such service. That power resides in the state public utilities commission. Both upon authority and reason a municipally owned public utility, as to service furnished consumers beyond its territorial jurisdiction, should be, as already stated, subject to the same regulation to which a privately owned public utility must conform in similar circumstances. * * * Our own cases, * * * distinctly hold that the utilities act applies to contracts entered into by a public utility corporation with a municipality, as well as with individuals and private corporations. The sale of a utility to a municipality, as here, adds nothing to and subtracts nothing from the contract. The relative rights and obligations of the original parties thereto, after the sale and assignment, passed to and remained with the new parties, just as it applied to the original parties. The contract, therefore, does not prevent the utilities commission from changing the rate."

In the interest of economy and efficiency, municipal corporations are permitted, in constructing their public utility plants, to build with the future in view, in order to have sufficient capacity to accommodate their increased growth and the demands for service which it brings; and in the meantime municipalities are permitted to dispose of their surplus product so far as this

does not impair the service for which the plant was primarily established. This rule of common business prudence is expressed as follows in the case of *Public Service Commission v. Loveland*, 79 Colo. 216, 245 Pac. 493: "From a business standpoint, the efficient and economical construction of the plant from the beginning essentially requires a capacity not only for present use, or for a given number of waiting customers, but due provision must also be made for a healthy city growth. The city may and it is its duty to make provision for, and to dispose of, such surplus product, when it does not impair the primary usefulness for which the plant was built. The dictates of common business prudence require that it be done."

While the municipality may dispose of its surplus capacity to nonresidents, the rate for doing so where fixed by contract, is binding on the municipality, because it is acting in its proprietary capacity and is under the same obligation to perform its contract as any private corporation, for as the court said in the case of *Tucson v. Sims* (Ariz.), 4 Pac. (2d) 673: "It is clear to us from the language of the contract that the Pima Realty Company and the city both intended that during the life of the agreement the residents of Menio Park would be charged the same rates for domestic water that consumers in the city were charged. * * * It will be observed, however, that neither of these provisions expressly prohibit it from doing so and in our view neither contains an implication to this effect, and this being true the fact that it may engage in the business of furnishing water to its own residents renders it immaterial under the circumstances whether the city has been specifically empowered by its charter or the statutes to furnish domestic water to outsiders. This is true, first, because it is well settled that municipal corporations have two powers, one legislative or governmental and the other proprietary, and that in operating a water system or lighting plant it is not acting in its governmental but proprietary capacity, and acts performed by it pursuant to this power are by the great weight of authority largely measured by the rule governing private corporations. * * *

A further reason why the absence of specific charter or statutory authority does not prevent it from furnishing water to nonresidents follows as a corollary of the foregoing and that is that when a city engaged in operating a water system or lighting plant develops a surplus of water or electric current, or a by-product of either, it may, as a mere incident of its right to furnish either, dispose of this surplus or by-product for the benefit

of the city. * * * Both provisions confer upon cities the right to do a specific thing but do not in terms or by necessary implication limit or prohibit them from doing something advantageous to themselves that is merely incidental to the thing specially authorized. Nothing short of an express prohibition or clear implication to that effect could have this result."

The practical attitude of our courts in permitting a municipality to dispose of its surplus water supply, and in their holding that in doing so its action will not be reviewed generally by the court is illustrated in the case of *Blade v. LaConner* (Wash.), 9 Pac. (2d) 381, where the court said: "In adopting the plan or system now under investigation, the town was exercising its legislative power. Such legislative action will be reviewed by the courts only in rare instances. Under Rem. Comp. Stat., section 9488, supra, respondent, in acquiring the Kolb plant as a part of its proposed water system, was not violating the law, even though that plant alone was incapable of furnishing an ample supply of water for the town's use. We are satisfied that, under the pleadings, it must be held that the contract between respondent and the city of Anacortes is not obnoxious to the objections urged by appellant. It must be taken as an admitted fact that the amount of water which the city of Anacortes undertakes to sell to respondent is, from the standpoint of the city, surplus, and that the city will have, over and above this amount, an ample supply for its own inhabitants."

While a municipal corporation is permitted to dispose of its surplus energy beyond its corporate limits and to extend its equipment for the purpose of doing so, it is liable under its contract for failing to render the service the same as any private corporation and will not be permitted to defend on the ground that it had no authority to make such a contract. This principle was clearly expressed as follows in *Valcour v. Morrisville* (Vt.), 158 Atl. 83: "We hold, therefore, that the defendant had the right to dispose of its surplus electricity outside its own limits and to extend its equipment as might be necessary for that purpose. * * * Its right to contract for the sale of its surplus current carried with it the corresponding liability to perform such contract as it made or respond in damages for failure so to do. It could not take the benefit of such contract and escape liability for its performance on the ground that it had no authority to make it, because as to such contract it did have authority. Indeed, it was the only way in which it could exercise its incidental right to sell its surplus."

CHAPTER 4

WHAT ARE MUNICIPAL PURPOSES WITHIN THE MEANING OF THE CONSTITUTION

Section	Section
25. Providing municipal public utilities discretionary.	34. Power to lease or operate municipal utilities.
26. Powers of municipal corporations fixed by construction.	35. Gas plants.
27. Liberal construction of "municipal purposes."	36. Convention hall.
28. Municipal public utilities as "municipal purposes."	37. Public wharves.
29. Waterworks a municipal purpose.	38. Municipal fuel yards.
30. Electric light plants.	39. Heating plant.
31. Bridges.	40. Manufacturing cement.
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33. Public memorial monument.	42. Liability insurance.
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§ 25. Providing municipal public utilities discretionary.—

All the functions and powers belonging to municipal corporations which are not governmental and public are strictly municipal and proprietary. Within this latter class of functions and belonging to the private business capacity of municipal corporations are municipal public utilities. The powers granted and the duties consequently imposed upon municipal corporations with reference to their municipal public utilities are discretionary and not imperative in their nature because the providing of such public utilities is a matter resting in the discretion of municipal corporations, and unless such discretion is grossly abused, its exercise will not be interfered with by the courts.

§ 26. Powers of municipal corporations fixed by construction.—Such powers, indeed, are granted by the legislature of the state for the special use and private advantage of municipal corporations. In granting and regulating these powers the legislature in turn is subject to the limitations of both the federal and state constitutions, and the attitude of our courts in their construction of these constitutional limitations on the powers vested in municipalities by statutory enactment with reference to the ownership and operation of municipal public utili-

ties largely determines the scope of the power of such municipal corporations in the matter of providing themselves and their citizens with the advantages of municipal public utilities. The important and ever increasing line of decisions defining the constitutional limitations of municipal corporations in this connection and fixing the nature and extent of their power determines what are municipal purposes within the meaning of the constitution.

§ 27. **Liberal construction of "municipal purposes."**—The judicial construction of the term "municipal purpose" in this connection is essential in determining the extent of the powers of municipal corporations expressly granted by statute, and in defining these statutory powers with reference to the question as to whether they are concerned with municipal purposes within the meaning of the constitution and in fixing the extent to which the people may be taxed for the purpose of providing these municipal public utilities. And while any abuse of authority which would result in the imposition of taxation without right has always been jealously guarded against by our courts as a violation of one of the very first and most fundamental of the principles of our government since the day of Magna Charta, the courts have been liberal in extending the meaning of the term "municipal purpose" so as to permit our municipalities promptly to take advantage of new inventions and modern conveniences for their private benefit and the advantage of their citizens.

An extension of the sphere of municipal activity is sustained by the court of Georgia in upholding the power of the city of Augusta to purchase or hire boats or barges for municipal uses, for the reason that in doing so the municipality is performing a municipal purpose within the meaning of its charter powers. This principle is established in the case of *Augusta v. Thomas*, 159 Ga. 435, 126 S. E. 144, where the court expressed the rule as follows: "Was it error for the trial court to hold that the above officials did not have the charter power to purchase or hire a boat or barge for municipal uses? * * * Indeed, it is hard to conceive of a general welfare clause in a charter being broader than the language of the charter under review. * * * From the foregoing authorities defining what is a public municipal purpose, and others which might be cited to the same effect, and from the broad language used in the city charter of Augusta, we are of the opinion that the purchasing of a boat for the uses set out in the pleadings as supported by the evi-

dence in this case is a 'public municipal purpose' within the meaning of the charter of the city of Augusta. Assuming that the city desired at any time to grade and to gravel its streets with gravel, which was beyond the city limits, and they desired to purchase or hire wagons and trucks for the purpose of hauling that gravel into the city and placing it upon the streets, could it be said that that was not a public municipal purpose; and if that is so, why could not the city, under the broad powers granted by its charter, buy or hire a boat or barge for the purpose of going beyond the city limits for the same or similar purpose, as well as for the other purposes set out in the answer of the city as amended? We are of the opinion that they could so do. * * * We are of the opinion, under the pleadings and the evidence in this case, that the facts set out do not amount to the creation of a debt as contemplated in the constitutional provision above quoted, and consequently that the trial judge erred in granting the injunction complained of. There is nothing in the record to show or to indicate that the city council of Augusta, or any one acting for it, had the intention of creating a debt or borrowing money."

That municipal authorities have a wide discretion in the exercise of their judgment in the absence of bad faith even though there may be an abuse of discretion, because the court will not undertake the task of substituting its judgment for that of the municipal authorities, is clearly decided in the case of *Van Antwerp v. Board of Commissioners*, 217 Ala. 201, 115 So. 239, where the court said: "In making contracts for municipal plants for public safety and convenience, within charter power, they act in a quasi legislative capacity. Acting upon a subject-matter committed to them and proceeding according to the forms required by law, the legislative discretion is vested in them, not in the courts. * * * It may well be said all cases of arbitrary action, that is to say, action based on no sound basis of reason, but expressive of a will to rule without due regard to the public interests involved, have an element of bad faith. But abuse of discretion of this character does not warrant relief. The case before us well illustrates the reason of such rule. The basic charge here is that the Mobile commissioners arbitrarily selected the more costly of two equally efficient incinerator plants. Necessarily, the court is invited to pass upon the relative merits of the products of two rival manufacturers and their adaptation to the needs of Mobile. Patently, this is the matter committed by law to the commissioners. To usurp

that function, the courts would find themselves the general supervisors over the governing bodies of cities, an impossible task, subversive of all autonomy in government. The bill does not make a case of fraud or corruption. It does not appear the price named for the type of incinerator selected was excessive or unreasonable, that any indirection or fraudulent methods were employed by the Superior Company, or even that such company had any advice of the greatly reduced offer of the Nye Company pending negotiations."

Municipalities have a wide discretion in determining the proper method for their sewerage disposal and where the lower court, trying the matter, respected the discretion of the municipal authorities in their judgment, the decision of the case on appeal may sustain the action of the lower court with perfect propriety, as is indicated in the case of *Cook v. Mebane*, 191 N. Car. 1, 131 S. E. 407, where the court said: "There are certain methods by which the sewage disposal of municipalities can be rendered practically harmless by establishing septic tanks, sewerage filters, and contact bed system, etc. There is no evidence that these precautionary methods were pursued by the town of Mebane in the present case. The only treatment the sewage got was that afforded by nature—purification as it flowed down the stream. This method was approved, from the evidence of defendant, by the state health department, so far as health goes. This approval did not concern nuisances. Under eminent domain (C. S., c. 33), if the town of Mebane has no charter rights on the subject, the right and remedy is given to condemn necessary land for the purpose (C. S., section 1706 [2]. 'Municipalities operating water systems and sewer systems,' etc. *Rouse v. Kinston*, 188 N. Car. 1, 123 S. E. 482. * * * This matter was in the sound discretion of the court below. The judgment rendered was not conditional. * * * The whole matter was practically one of fact for the jury. * * * The court below tried this important case with care and caution."

That municipalities may establish bathing beaches for colored citizens, separate and apart from whites, and that their wisdom in doing so as a precautionary measure, taken for the separation of their races, will be upheld by the courts as a proper exercise of their discretionary powers is well established and its application to the particular facts clearly pointed out in the case of *Page v. Commonwealth* (Va. App.), 160 S. E. 33, where the court said: "The city of Norfolk, in undertaking to establish a bathing beach and recreation park for the benefit of its colored citizens,

is not attempting to do an illegal thing. The purpose for which the city proposes to spend public money is within the power expressly delegated to it both by general law and its charter.

* * * On the merits, we think the action of the commission is plainly right. The owners and lessees of the land admit that it is not essential to their purposes. The only question, then, before the commission was whether a public necessity or an essential public convenience required the condemnation of this particular land. * * * This property is situated about two miles from the city limits and so located that reasonable access to it can be furnished without unreasonable expense; it is in a sparsely settled section, is more or less isolated, and in the proposed use as little contact will be made with the white inhabitants as could be expected in the growing section of which Norfolk city is the center. Segregation of the races is a public policy expressed in numerous statutes. The determination of suitable recreational facilities for both the white and the negro population is left to a great extent in the discretion of the municipal authorities. In the instant case, the council of the city of Norfolk, after a careful survey of the situation, has declared that an essential public convenience or public necessity requires that the property in question be taken. The corporation commission has approved that conclusion, and we likewise approve its action."

§ 28. **Municipal public utilities as "municipal purposes."**—While the intention of the legislature as expressed in the statute is effective only when within the scope of the constitutional limitation, in determining what may be granted by the statute not inconsistent with the constitution, the courts have generally been favorable to the granting of the power and upheld the statutes providing for municipal public utilities. In defining the extent of the power of the municipal corporation to provide itself with municipal public utilities it is accordingly necessary to determine what public utilities, provided for by statute, are included within "municipal purposes."¹

¹ *United States. Hamilton Gas Light &c. Co. v. Hamilton City*, Ohio, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90; *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. 483, P. U. R. 1917E, 539; *Jones v. Portland, Maine*, 245 U. S. 217, 62 L. ed. 252, 38 Sup. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660; *Boston, Massachusetts v. Jackson*, 260 U. S. 309, 67 L. ed. 274, 43 Sup. Ct. 129; *Trenton, New Jersey v.*

State of New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. 534, 29 A. L. R. 1471; *Corporation Commission v. Lowe*, 281 U. S. 431, 74 L. ed. 945, 50 Sup. Ct. 399; *New State Ice Co. v. Ernest A. Liebmann*, — U. S. —, 76 L. ed. 747 (Adv. Sh.), 52 Sup. Ct. 371, P. U. R. 1932B, 901. *Federal. De Pauw University v. Public Service Comm.*, 247 Fed. 183; *De Pauw University v. Public Service Comm.*, 253 Fed. 848; *Mutual Oil*

Co. v. Zehrung, 11 Fed. (2d) 887; United States v. Tujunga Water & Co., 18 Fed. (2d) 120; United States v. Parkins, 18 Fed. (2d) 642; In re Louis Wohl, Inc., 50 Fed. (2d) 254, P. U. R. 1931D, 361; Hoskins v. Orlando, Florida, 51 Fed. (2d) 901.

Alabama. Pilcher v. Dothan, 207 Ala. 421, 93 So. 16.

California. Los Angeles v. Lewis, 175 Cal. 777, 167 Pac. 290; Mound Water Co. v. Southern California Edison Co., 184 Cal. 602, 194 Pac. 1014, P. U. R. 1921C, 354; Water Users & C. Assn. v. Railroad Commission, 188 Cal. 437, 205 Pac. 682; Mines v. Del Valle, 201 Cal. 273, 257 Pac. 530; Babcock v. C. W. Clarke Co. (Cal.), 2 Pac. (2d) 155; Golden Gate Bridge & C. Dist. v. Felt (Cal.), 5 Pac. (2d) 585.

Colorado. Colorado Springs v. Pikes Peak Hydro-Elec. Co., 57 Colo. 169, 140 Pac. 921.

Connecticut. New Haven Water Co. v. Russell, 86 Conn. 361, 85 Atl. 686; In re Board of Water Comrs., 87 Conn. 193, 87 Atl. 870, Ann. Cas. 1915A, 1105.

Florida. Jacksonville Elec. Light Co. v. Jacksonville, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. 24; Middleton v. St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. 227; Bradenstown v. State, 88 Fla. 381, 102 So. 556, 36 A. L. R. 1297.

Georgia. Augusta v. Thomas, 159 Ga. 435, 126 S. E. 144; Rholetter v. Flor, 166 Ga. 100, 142 S. E. 552.

Illinois. State Public Utilities Comm. v. Noble Mut. Tel. Co., 268 Ill. 411, 109 N. E. 298, Ann. Cas. 1916D, 897; State Public Utilities Com. v. Bethany Mut. Tel. Assn., 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495; Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, 111 N. E. 573, L. R. A. 1916D, 991; State Public Utilities Comm. v. Noble, 275 Ill. 121, 113 N. E. 910; State Public Utilities Comm. v. Chicago & W. T. R. Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; Highland Dairy Farms Co. v.

Helvetia Milk Condensing Co., 308 Ill. 294, 139 N. E. 418.

Indiana. Cooper v. Middletown, 56 Ind. App. 374, 105 N. E. 393.

Iowa. Sibley v. Ocheyedan Elec. Co., 194 Iowa 950, 187 N. W. 560.

Kansas. State v. Trego County Co-Operative Tel. Co., 112 Kans. 701, 212 Pac. 902.

Maine. Laughlin v. Portland, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734.

Maryland. Mealey v. Hagers-town, 92 Md. 741, 48 Atl. 746.

Massachusetts. In re Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; In re Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; Townsend v. Boston, 187 Mass. 283, 72 N. E. 991; In re Opinion of the Justices, 231 Mass. 603, 122 N. E. 763, P. U. R. 1919D, 612; Boston v. Treasurer & Receiver General, 237 Mass. 403, 130 N. E. 390.

Michigan. Andrews v. South Haven, 187 Mich. 294, 153 N. W. 827, L. R. A. 1916A, 908, Ann. Cas. 1918B, 100; Schurtz v. Grand Rapids, 208 Mich. 510, 175 N. W. 421.

Minnesota. Minneapolis v. Janney, 86 Minn. 111, 90 N. W. 312; Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042; Central Lbr. Co. v. Waseca, 152 Minn. 201, 188 N. W. 275; State v. Boyd Transfer & C. Co., 168 Minn. 190, 209 N. W. 872, P. U. R. 1927A, 182.

Mississippi. Hazelhurst v. Mayes, 84 Miss. 7, 36 So. 33, 64 L. R. A. 805.

Missouri. State v. Allen, 178 Mo. 555, 77 S. W. 868.

Montana. State v. Boyle, 62 Mont. 97, 204 Pac. 378.

Nebraska. State v. Southern Elkhorn Tel. Co., 106 Nebr. 342, 183 N. W. 562, P. U. R. 1921E, 33; Metropolitan Utilities Dist. v. Omaha, 112 Nebr. 93, 198 N. W. 858; State v. Johnson, 117 Nebr. 301, 220 N. W. 273.

New Hampshire. Newport v. Unity, 68 N. H. 587, 44 Atl. 704, 73 Am. St. 626.

New Jersey. Livermore v. Mill-

§ 29. **Waterworks a municipal purpose.**—In the early case of *Comstock v. Syracuse*, 5 N. Y. S. 874, 25 N. Y. St. 611, the court defined the term “city or municipal purpose” in connection with its holding that the city may provide its inhabitants with water, and supported its decision by the following practical argument: “It has already been suggested that paramount to all single requirements which the wants of a city demand is that of an abundant supply of pure and wholesome water. The health

ville, 85 N. J. L. 655, 90 Atl. 380; *Acquackanonk Water Co. v. Board of Public Utility Comrs.*, 97 N. J. L. 366, 118 Atl. 535; *East Jersey Water Co. v. Board of Public Utility Comrs.*, 98 N. J. L. 449, 119 Atl. 679.

New Mexico. *Smith v. Raton*, 18 N. Mex. 613, 140 Pac. 109.

New York. *Hequembourg v. Dunkirk*, 49 Hun (N. Y.) 550, 2 N. Y. S. 447, 18 N. Y. St. 570; *People v. Kelly*, 76 N. Y. 475; *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; *Sun Printing & Assn. v. New York*, 8 App. Div. (N. Y.) 230, 40 N. Y. S. 607, 75 N. Y. St. 1, affd. in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; *Parsons v. Van Wyck*, 56 App. Div. 329, 67 N. Y. S. 1054; *Comstock v. Syracuse*, 5 N. Y. S. 874, 25 N. Y. St. 611.

North Carolina. *Greensboro v. Scott*, 138 N. Car. 181, 50 S. E. 589; *Holmes v. Fayetteville*, 197 N. Car. 740, 150 S. E. 624, P. U. R. 1930A, 369.

Ohio. *State v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; *State v. Lynch*, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949; *Travelers Ins. Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711; *Craig v. Public Utilities Commission*, 115 Ohio St. 512, 154 N. E. 795, P. U. R. 1927B, 845; *Jonas v. Swetland Co.*, 29 Ohio App. 4, 162 N. E. 755, affd. in 119 Ohio St. 112, 162 N. E. 45.

Oklahoma. *State v. Barnes*, 22 Okla. 191, 97 Pac. 997; *In re Afton*, 43 Okla. 720, 144 Pac. 184, L. R. A. 1915D, 978; *Dunagan v. Red Rock*,

58 Okla. 218, 158 Pac. 1170, P. U. R. 1916F, 980; *Denton v. Sapulpa*, 78 Okla. 178, 189 Pac. 532, 9 A. L. R. 1031; *Williams v. Norman*, 85 Okla. 230, 205 Pac. 144; *Schmoldt v. Oklahoma City*, 144 Okla. 208, 291 Pac. 119; *Ardmore v. Excise Board of Carter County (Okla.)*, 8 Pac. (2d) 2.

Oregon. *Twohy Bros. Co. v. Ochoco Irr. Dist.*, 108 Ore. 1, 210 Pac. 873, 216 Pac. 189; *Mollencop v. Salem (Ore.)*, 8 Pac. (2d) 783.

Pennsylvania. *Union County v. Northumberland County*, 281 Pa. 62, 126 Atl. 197; *Wentz v. Philadelphia (Pa.)*, 151 Atl. 883.

South Carolina. *Green v. Rock Hill*, 149 S. Car. 234, 147 S. E. 346.

Texas. *Denton v. Denton Home Ice Co.*, 119 Tex. 193, 27 S. W. (2d) 119; *Bass v. Clifton (Tex. Civ. App.)*, 261 S. W. 795.

Vermont. *Burlington v. Central Vermont R. Co.*, 82 Vt. 5, 71 Atl. 826; *Valcour v. Morrisville (Vt.)*, 158 Atl. 83.

Virginia. *Lynchburg v. Lynchburg Trac. & Co.*, 124 Va. 130, 97 S. E. 780; *Page v. Commonwealth (Va. App.)*, 160 S. E. 33.

Washington. *State v. Seattle*, 104 Wash. 634, 177 Pac. 671, 180 Pac. 137.

West Virginia. *Mill Creek Coal & Co. v. Public Service Comm.*, 84 W. Va. 662, 100 S. E. 557, 7 A. L. R. 1081, P. U. R. 1920A, 704.

Wisconsin. *Cawker v. Meyer*, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. (N. S.) 510.

Wyoming. *Seaman v. Big Horn Canal Assn.*, 29 Wyo. 391, 213 Pac. 928.

and life of the citizens are involved in this, and the prosperity of the city and the safety of its property are dependent upon it. In the light of its importance we have in this state invested private corporations, created for the purpose of furnishing water to villages and cities, with the extraordinary power of the exercise of eminent domain, although the same is created for and looks only to securing to its promoters individual profit alone. I am not aware that this power is invested in any purely private corporation, except organized for the purpose named. While it is true that a city may, if it so elect, rely upon the efforts of individuals and companies for its water supply, whether it shall do so is a matter of discretion on its part. The necessities of the case, however, are so great, and the welfare of the people so much involved in the furnishing and maintenance of a reliable and continuous service, that prudence would seem to dictate that satisfactory results will be made more secure where the city assumes this important duty, and attends to its performance. In the light of these suggestions I find no difficulty in concluding that a supply of water for city purposes, as well as for the use of its inhabitants, is a city enterprise, and peculiarly for a city purpose; nor are we without authority upon this subject."

Municipalities are permitted to own and operate a system of waterworks and an electric light plant to be paid for by funds raised by general taxation for the reason that the purpose is public and the enterprise is for the general benefit of their inhabitants. That funds for such purposes may also be realized by local special assessments on abutting property, which is especially benefited, is the effect of the decision in the case of *Bank of Commerce v. Huddleston*, 172 Ark. 999, 291 S. W. 422, where the court said: "As we have already seen, cities and towns may be organized under our statute for the purpose of constructing a system of waterworks and electric lights, and the whole area of the city or town may be embraced within the boundaries of such district. Again, it is well settled that a system of waterworks and electric lights may be constructed by cities and towns themselves, and paid for by general taxes. The power of constructing waterworks and lighting the streets and other public places of cities and towns by electricity is conferred by statute. *Crawford's & Moses' Digest*, sections 7564, 7565. Water and light are essential to the welfare of a city or compactly settled municipality. Therefore the power to construct and maintain a system of waterworks and electric lights for municipal and domestic pur-

poses may be conferred by the legislature upon such municipalities. * * * When the city is authorized to construct waterworks and electric lights, it may necessarily create a debt for that purpose. Such a use of the corporate credit is for a public purpose and is not the loan of the credit of the municipality. There is nothing in the transaction in question which contravenes article 16, section 1, of the Constitution. The city of McGehee, in effect, expended the amount of money evidenced by the warrants issued by it to help build a system of waterworks and electric lights, which were being constructed under an improvement district legally organized under the statute. The city did not thereby loan its credit or become security, directly or indirectly, for any person or corporation, or for any purpose. It is simply stipulated that it would pay a certain part of the cost of construction of a system of waterworks and electric lights, which were being constructed by a public agency, and not by a private corporation or association of individuals. The issuance of the warrants was for a public purpose, and not in aid of any private enterprise. * * * The erection and maintenance of a system of waterworks and electric lights constitute a public improvement, which may be constructed by local assessments on the real property specially benefited. It may also happen that the general public shares to a greater or less extent in the benefits, and, when that happens, the city may contribute towards the construction of the improvement. * * * These cases hold that public funds of a city may be contributed by the city in order to complete a public improvement which has been constructed in part by the commissioners of an improvement district. This is practically what was done in the case at bar, and we are of the opinion that the transaction, when considered according to its substance, does not contravene article 16, section 1, of our Constitution."

§ 30. **Electric light plants.**—The case of *Hequembourg v. Dunkirk*, 49 Hun (N. Y.) 550, 2 N. Y. S. 447, 18 N. Y. St. 570, decided in 1888, was an action to enjoin the defendant city from constructing an electric light plant. The question decided by this case is whether the issuing of bonds to establish an electric light system for the purpose of supplying the said city and its inhabitants with electricity is in violation of article 8, section 11 of the Constitution, which provides that "no county, city, town or village shall hereafter give any money, * * * nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village pur-

poses." In refusing to enjoin the erection of the plant the court held that furnishing electricity for the private use of the citizens was the performance of a municipal purpose when done in connection with the ownership and operation of the plant for supplying the public needs of the city, saying in part: "We think it may safely be assumed that the lighting of the streets and public places is one of the duties devolving upon the municipal government, and is a city purpose within the provisions of the constitution. What is and what is not a municipal purpose is, in many cases, doubtful and uncertain, and it is the duty of the courts in such cases to give weight to the legislative determination and not to annul its acts, unless it clearly appears that the act was not authorized. * * * If we are correct in this view, we fail to see why gas or electric light works may not be sanctioned on the same theory. The lighting of the streets by gas involves the necessity of laying mains through the streets, with which the lamps may be supplied with gas; and, in lighting by electricity, the stringing of wires or the laying of conduits, through which the electricity may be conveyed. Light in dwellings is as important and essential as upon the streets, and promotes the general comfort, safety and welfare of the inhabitants; and when it is supplied in connection with that which is furnished by the municipality, under its duty to the public, we think it may be regarded as an incident thereto, and one of the purposes for which the municipality may properly contract."

In sustaining the power of the city in granting a private franchise to an electric light company to reserve the right in the city to purchase such plant, the court in holding such to be a municipal purpose in the case of *Colorado Springs v. Pikes Peak Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921, said: "While functions of the municipality, such as the erection and maintenance of public utilities, are not governmental in their nature, yet they are strictly municipal purposes; that is to say, they are intended specially and peculiarly to promote the comfort, convenience, safety, and happiness of the citizens of the municipality, though perhaps not essential to the welfare of the general public. * * * The generation and sale of electric power is the sole business in which Jackson and the defendant, his assignee, has been engaged. This power has been sold not only to the intervenor but to other cities and to industrial companies. Then why is it not entirely reasonable to conclude that, as one of the considerations of the granting of so valuable a franchise,

the city should reserve to itself the right to purchase the power it might at any time require, upon the same terms as the most favored customer of the owners of the power plant, to be so erected under and by virtue of the franchise. Aside from this, the city was to receive comparatively little for the franchise granted."

That the power of the city to own and operate an electric light plant does not authorize it to contract for electrical energy from a private plant with funds raised for the purchase of its own plant is decided in the case of *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393, where the court said: "Independent of this statute, appellee town, by virtue of, and as incidental to, the ordinary powers given it by the state as such municipal corporation, and as necessary to a proper exercise of its functions as such corporation, had the right to use its accumulated funds and current revenues, not otherwise appropriated, for the purpose of furnishing its streets, alleys, parks, and other public places and buildings with electric lights. *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 215, 16 Am. St. 388; *Dillon, Municipal Corporations* (5th edition), section 1302. See, also, *McQuillin, Municipal Corporations*, section 1783. * * * It is sufficient for the purposes of the question which we are called on to decide to say that the averments of the complaint show that such town by such resolution of its said board determined to build an electric light plant. It is further averred, in effect, that such board is not building such a plant, and does not intend to build one, but that, on the contrary, it is about to purchase poles, wire, and equipment to be placed in the streets of said town at an expense of more than its bond issue, and has entered into a contract with its coappellee to purchase of it electric current to light said town. These averments are, we think, sufficient to show that such board is not using the funds derived from said bond sale for the purpose authorized by said statute and the resolution passed pursuant thereto. While such appliances and equipment might in some cases be treated and spoken of as a distributing plant, we are of the opinion that such equipment falls short of being 'electric light works', within the meaning of the statute under consideration. We think it clear that the 'electric light works' contemplated by this statute, and hence voted for by the citizens of said town, comprehends and includes

not only the equipment and appliances necessary to receive and carry the current, but also a generating plant."

The scope of the authority of the municipality is liberally construed in determining the lines of public service which the city may afford its inhabitants. The manner in which these plants may be operated and the nature of the service is left largely to the discretion of the municipal authorities, as is indicated in the case of *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827, L. R. A. 1916A, 908, Ann. Cas. 1918B, 100: "The electric light plant which defendant owned and operated, although a municipal public utility, was a business concern or enterprise. In its operation and business management the city had the right and power to do those things naturally connected with and belonging to the running of such a business which private corporations would have in the same connection. Pond on Public Utilities, section 8. The power to engage in this municipal business activity for the public welfare is necessarily conferred in general terms. To go into details of administration and specify each particular thing which could or could not be done would be unwise and practically impossible. * * * The statute and constitution do not in terms limit the service to supplying the energy but authorize the city to supply its inhabitants with water, light, heat, power and transportation. It may well be contended that furnishing to customers taking electricity the necessary devices or equipment to produce heat, power, or light from the current is naturally incidental to and an implied power connected with the business of operating an electric light plant."

That under statutory authority, municipalities may acquire and maintain golf courses and may be required to repay money loaned for the purpose of doing so, is the effect of the decision in the case of *West v. Lake Placid*, 97 Fla. 127, 120 So. 361, where the court said: "The municipality is indebted to Lake Placid Land Company in the sum of \$35,000, evidenced by promissory notes of the municipality for money loaned by the land company and used by the municipality in preliminary work upon the proposed golf course. * * * The Charter Act, sections 3-H and 48, expressly authorizes the town to acquire and maintain golf courses. When proper authority is granted by the legislature, the ownership, maintenance, and operation of public golf courses is a permissible municipal function under the Constitution (article 9, section 5). * * * The town commission, by unanimous vote, has formally declared the payment of the indebtedness aforesaid to be 'for public benefit, of public

nature and for public welfare.' The last-mentioned provision of the charter does not, of course, confer unlimited authority on the commission to determine what is a public municipal function, nor is the finding of the town commission conclusive of the matter. That question is always for ultimate judicial determination, though due weight will be given to a determination by legislative authority."

That municipalities may acquire and improve land for park purposes and establish golf courses thereon and install a system of electric lights to be known as the White Way, where the bond issue has been validated by judicial decree, although golf courses may be a doubtful municipal purpose, especially if the issue is authorized by statute, is the effect of the decision in the case of *Peterson v. Davenport*, 90 Fla. 71, 105 So. 265, for as the court said: "The appeal was taken from a decree validating bonds to be issued by the town of Davenport, in the amount of \$35,000, for the purpose of acquiring and improving land as a public park, by laying out and establishing a golf course thereon and for other park purposes, and validating bonds to be issued by the town of Davenport, in the amount of \$10,000, for the purpose of improving stated streets in said town by installing thereon an additional system of electric lights to be known as a White Way. * * * A municipality may issue bonds to be paid by taxation, only for municipal purposes, and only as authorized by charter or other statutory enactments. Whether the object for which bonds are to be issued is a municipal purpose may not be arbitrarily determined by legislation without regard to organic limitations; but a statutory determination of what is an appropriate municipal purpose will not be disturbed by the courts, where the purpose designated by statute is in fact municipal in its nature and no provision or principle of organic law is violated in such designation. Where proposed municipal bond issues for street lights, which is obviously a municipal purpose, and for a golf course, which is a possible municipal purpose [*City of Bradentown v. State (Fla.)*, 102 So. 556], are validated by judicial decree, and, pending an appeal from such decree, a statute is duly enacted specifically validating the proceedings taken for such bond issues, and making the bonds so issued binding obligations upon the municipality, thereby determining that the bond issue for a golf course is an appropriate municipal purpose, and validating bonds for that purpose, and it not appearing that any organic limitation is thereby violated, the judicial decree validating the bond issues will be affirmed."

Although the policy of liberal construction is generally recognized in defining the scope of the authority and the extent of the sphere of the activity of municipal corporations in the operation of public utilities, and in determining what are municipal purposes, practical limitations on this doctrine are well illustrated and defined where the court denied the municipality the right to use funds to influence voters in favor of a bond issue in the course of a campaign on the subject. In stating this practical rule, defining the limitations of the power of municipal corporations in this connection, the court expressed the rule as follows in the case of *Mines v. Del Valle*, 201 Cal. 273, 257 Pac. 530: "It is alleged in the complaint, and not denied by appellants, that said funds were used for the purpose and with the intent of influencing the voters of said city to vote in favor of said bond issue. * * *

That the powers of a city of a proprietary character are given a more liberal construction than those which are strictly governmental in character is settled beyond controversy by the decisions of our courts, and this rule is approved by our best textwriters. But, conceding this to be true, it does not follow that a municipality in exercising its powers in its proprietary capacity has the authority to do any act or thing which its officers may think necessary for the proper conduct or maintenance of the business in which it is engaged. * * * It would be an unreasonable and unwarranted extension of the principle enunciated in these and similar cases, because in the instances considered therein the several municipalities were found to be acting within the scope of their authority, to hold that a city or one of its governmental boards, authorized to maintain, conduct, and extend a public utility, could use the funds with which it is intrusted for the purpose of conducting said public utility, for an entirely different and distinct purpose—that of carrying on a campaign for the purpose of influencing the voters of said city in favor of a bond issue. * * * As already stated, we find nothing either in the charter of the city or in any statutory enactment or otherwise which confers such authority upon said board of public service commissioners."

In sustaining the power of the city to furnish its inhabitants with electric light because such action would be for their best interests and because it would be a municipal purpose, the Supreme Court of Florida in *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. 24, decided in 1895, expressed this well-established principle by

saying: "The grant of power to the city of Jacksonville to provide for lighting the city by gas or other illuminating material, or in any other manner, is clear and explicit, and carries with it the power of the choice of means to accomplish the end. Should this power be construed into a right to light the streets and public places of the city, but not to supply the inhabitants thereof with light for use in their private houses? * * *

We are of the opinion that a fair construction of the grant 'to provide for lighting the city by gas or other illuminating material, or in any other manner,' will authorize the erection and maintenance of an electric light plant, not only for lighting the streets and public places of the city, but also for supplying in connection therewith, electric light for the inhabitants of the city in their private houses. The power given is to light the city, and the connection indicates that the legislature was conferring powers for the benefit of the people generally of the city. * * * That supplying the inhabitants of a city with electric light is such a municipal purpose as will authorize its delegation by the legislature to municipal bodies is sustained by all the authorities we have found. To the extent of supplying light to the inhabitants of a city for use in their private houses, we discover nothing that can not, in the light of the decisions, be called a municipal purpose."

§ 31. **Bridges.**—The leading case of *People v. Kelly*, 76 N. Y. 475, indicates the liberal policy of the courts to be one of long standing. In the course of its decision, finding that the cities concerned had the power to erect the Brooklyn bridge, the court said: "Having nothing to say about the wisdom of the legislation under consideration, I am confident in the conclusion that the construction of this bridge is a city purpose of each city, and that each city can incur debt for the same, and that the act of 1875 is not in conflict with any provisions of the constitution."

The liberal attitude of our courts in construing municipal charters to permit of the construction and operation of a bridge extending from the limits of a city across the river which is a state boundary to an adjoining city on the other side of the river, because the purpose is municipal and public and the power involved in its exercise governmental in its nature, is found in the case of *Klein v. Louisville*, 224 Ky. 624, 6 S. W. (2d) 1104: "We conclude that, even though the construction, operation, and control of a bridge by the city as here provided may not be the exercise of a governmental power in its strict sense, yet it is evident that such power is to be exercised for a public purpose, and that it is incidental to the government of the municipality,

and, as it is granted to all cities of the same class, it is not forbidden by subsection 29 of section 59 of the Constitution.

* * * It is next argued that the act creates an indebtedness of the city in excess of the constitutional limitation provided in sections 157, 158. As to this it will be noted that the act itself, the indenture agreement, and the bonds to be issued all specifically provide that the indebtedness shall be paid from a special fund derived from the tolls and revenues of the bridge; and that the city shall not incur any indebtedness or obligation thereby. Neither the bridge nor any of the real estate or appurtenances are put in lien to secure the payment of the bonds. * * *

It is next urged that the act violates section 181 of the Constitution (a) in delegating the power of taxation (fixing tolls) to the commission; (b) that such taxes (toll) will fall upon persons not residents and citizens of the city of Louisville. But not so

* * * . Tolls are not taxes, but are charges upon the privileges of using the bridge, and are analogous to special assessments levied on property for street improvements in consideration of special benefits or privileges thereby conferred, and which do not constitute a tax. * * *

It is strongly argued that a sale of the bonds below par is a violation of section 193 of the Constitution * * * . As explained in *Carrollton F. M. Co. v. City of Carrollton*, 104 Ky. 525, 47 S. W. 439, 885, sections 190 to 208, inclusive, of the Constitution relate to private corporations only. The bonds in question are bonds of the city of Louisville, albeit they are paid from a special fund. The bridge is to be the property of the city from the beginning."

A municipality or highway district, acting under proper statutory authority, may erect a bridge within its borders and issue bonds for the purpose of paying for it because the purpose is municipal, for as the court said in the case of *Golden Gate Bridge & c. District v. Felt* (Cal.), 5 Pac. (2d) 585: "This is a petition for a writ of mandate, to compel respondent, as secretary of the board of directors of Golden Gate bridge and highway district, to sign certain bonds proposed to be issued by said district.

* * * The value of the proposed bridge is state-wide; when constructed, it will become an integral part of the Redwood Highway, linking the northern and southern parts of the state with one continuous modern avenue for traffic, and also a part of the state highway entering two neighboring states. The board of directors has completed its plans, has already entered into exceptionally favorable contracts for construction, and has solicited bids for its bonds. All such bids, however, have been conditioned upon a judicial determination of their validity. The

legislature itself has, in enacting the 1931 amendments to the statute and the Validating Act, declared the urgency of prompt action, both to relieve congested traffic and to furnish work for a large number of people now unemployed. * * * The legislative intention is unmistakable; the amending act is declared to be an urgency measure, and was obviously designed to facilitate the issuance of bonds by petitioner, the only district as yet organized under the statute. The further contention of amici curiae that such a retroactive interpretation would result in a lack of uniformity under article 1, section 11, of the California Constitution, is equally untenable. The statute as amended applies uniformly to all bridge and highway districts and to all bonds to be issued by them. There being no merit in any of the objections to the issuance of the proposed bonds, it is the duty of respondent to sign them as directed by petitioner. It is therefore ordered that the writ of mandate issue."

§ 32. **Transportation systems.**—The case of *Sun Printing & Publishing Assn. v. New York*, 8 App. Div. (N. Y.) 230, 40 N. Y. S. 607, 75 N. Y. St. 1 (affd. in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788), decided in 1897, is of special interest as showing the attitude of the court with reference to the increasing and elastic powers belonging to municipal corporations. The court defined its position on the question clearly and frankly as follows: "The question is then raised whether a rapid transit railroad, wholly within the limits of a city, is a city purpose. * * * In considering this question it must be premised that cities are not limited to providing for the strict necessities of their citizens. Under legislative authority, they may minister to their comfort, health, pleasure, or education. * * * To hold that the legislature of this state, acting as the *parens patriae*, may employ for the relief or welfare of the inhabitants of the cities of the state only those methods and agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon the fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state. Whenever the question has been considered, it has been universally treated in the broadest spirit. * * * The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need or contribute to the convenience of the people of the city at large.

Within that sphere of action, novelty should impose no veto. Should some inventive genius by and by create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want and dangerous the delay? Will it then be said that pure air is not so important as pure water and clear light? We apprehend not."

In holding that the laws of Massachusetts conferred sufficient authority upon that state for it to operate an elevated railway company for the public benefit for the reason that such a purpose was public and of vital interest to the inhabitants of the cities served on the failure of the private company, operating the local street railway system, Chief Justice Taft, in the case of *Boston, Massachusetts v. Jackson*, 260 U. S. 309, 67 L. ed. 274, 43 Sup. Ct. 129, said: "The taxes collected were state taxes to achieve a state purpose, and Boston, in its public and political character, was a mere state tax agency for the collection. The taxpayers were to be called upon to bear the burden of the public purpose of the state in furnishing this important service of transportation in and between the communities in which they lived. If this was in accord with the state constitution and statutes, as we must and do find it to be from the well-reasoned opinion of the Supreme Judicial Court, we can not see that, in any respect, the levy of the tax for deficits impairs Boston's contract with the railway company. * * * In this conclusion, we assume, as did the Supreme Court, that the state may confer on one of its subdivisions, like a city or town, the private proprietary capacity by which it may acquire contract or property rights protected by the federal Constitution against subsequent impairment by its creator, the state."

§ 33. **Public memorial monument.**—The New York Supreme Court in 1900 reiterated its favorable attitude toward an increase of the sphere of municipal activity in the case of *Parsons v. Van Wyck*, 56 App. Div. (N. Y.) 329, 67 N. Y. S. 1054. In this case it refused relief in an action brought by a taxpayer to restrain an alleged unlawful expenditure of municipal funds by the defendants, who were members of the Soldiers' and Sailors' Memorial Arch Commission of the city of New York provided for by chapter 522 of the Laws of 1893, and were engaged in erecting a proposed memorial monument in Riverside Park near Eighty-ninth street. The court stated its decision after referring to other similar cases by saying: "In the same liberal spirit, we think the erection of a beautiful monument or memorial is serving a public purpose."

§ 34. **Power to lease or operate municipal utilities.**—The case of *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054, decided June 29, 1912, expressly sustained the case of *Sun Printing & Publishing Assn. v. New York*, 8 App. Div. (N. Y.) 230, 40 N. Y. S. 607, 75 N. Y. St. 1 (aff'd. in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788), and extended the application of the principle which permitted the building and leasing for operation of the rapid transit system belonging to New York City to the leasing and operation of such a system in connection with that belonging to a private concern for the purpose of securing a unified system of transportation throughout the city. The practical advantage to the citizens of such an arrangement was considered by the court in deciding that such a construction and manner of operating the transit system was a municipal purpose within the meaning of the constitution of New York, and that the agreement for jointly operating the two systems, one owned by the city and the other by private capital, was in the interest of economy and for the convenience of the citizens, for in the course of its decision, the court said: "The question is whether the municipality, instead of building subways at an enormous expense over the entire territory may build them in part of it, and then make a contract for their operation with the owner of the privately owned system, under which the latter agrees to operate its system in conjunction with the subways, and subject to a single fare. It seems to me that it may thus do; and that the statement of the proposition very largely supplies the argument in its favor."

In the case of *Townsend v. Boston*, 187 Mass. 283, 72 N. E. 991, decided in 1905, the Supreme Court of Massachusetts recognized as constitutional and held to be valid a statute under which the city of Boston owned and operated a certain ferry. The case was an action in tort for personal injuries sustained by the plaintiff to the action while a passenger on a ferry boat which the defendant city owned and was operating.

In *Re Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487, as given in 1890, in reply to certain questions submitted to the court by the legislature, it was held that, if the legislature be of the opinion that the general welfare and convenience of the inhabitants of municipalities will be promoted by giving the cities the power of furnishing them with gas or electricity for light, such power may be so conferred within the constitution. In the course of its opinion the court said that: "The statutes are well known which authorize cities and towns

to maintain waterworks for supplying their inhabitants with water, and the constitutionality of these statutes has not been doubted."

The court defines the limitation to be placed on this power in *Re Opinion of the Justices*, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809, decided in 1892, in refusing the right of the legislature within the constitution to confer on municipalities the power to purchase and to furnish coal and wood for fuel to its inhabitants because the carrying on of such a business for the public benefit could not be regarded as a public or municipal service.

The case of *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. 227, decided in 1900, holds that under the constitution of that state the legislature can authorize municipal corporations to erect and own electric light plants for supplying lights to their citizens and to issue bonds for such purpose, either with or without the sanction of its individual citizens or taxpayers because the purpose is municipal.

The case of *Mealey v. Hagerstown*, 92 Md. 741, 48 Atl. 746, decided in 1901, states this well established rule of law as follows: "It [the defendant city] is certainly authorized to provide for lighting the streets and other public places within the corporate limits. We do not understand it to be seriously questioned that it can furnish light to its citizens, if the act of 1900 is valid. There are many cases which establish the right of a municipality, owning its plant for lighting, to provide light to its citizens just as it may supply them with water, if the legislature so authorizes."

§ 35. **Gas plants.**—The early case of *State v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729, decided in 1891, is of special interest because it refused to enjoin the defendant city from supplying natural gas for its public use and the private use of its inhabitants. The very clear and common-sense reasoning of the court follows: "Taxation implies an imposition for a public use. * * * But what are public purposes is a question that must be left to the legislature, to be decided upon its own judgment and discretion. * * * Water, light and heat are objects of prime necessity. * * * It is now well settled that the legislature in the exercise of its constitutional power may authorize cities to appropriate real estate for waterworks, * * * . What we have said in reference to waterworks is for the most part applicable to the erecting and maintaining of natural or artificial gas works. * * * Heat being

an agent or principle indispensable to the health, comfort and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water.

* * * It is sufficient 'if every inhabitant who is so situated that he can use it, has the same right to use it as the other inhabitants.' * * * The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy; but in deciding whether in a given case the object for which taxes are assessed is a public or a private purpose, we can not leave out of view the progress of society, the change of manners and customs and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power; and in deciding whether such taxes shall be levied for the new purposes that have arisen we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied." The validity of this Ohio statute giving municipal corporations the power to supply their inhabitants with gas was sustained by the Supreme Court of the United States.²

That a municipal corporation, authorized to purchase, construct, and operate gas plants, acquires such property for public use and that in doing so it may be charged with a public trust for the benefit of its inhabitants is the effect of a recent decision of our federal courts in reference to the Citizens Gas Company of Indianapolis. In holding that such an establishment and operation of a gas plant by the municipality constituted a proper object for a public, charitable trust, where proper obligations are imposed upon the company for such purpose as a condition of granting its franchise is the effect of the decision in the well-reasoned case of *Todd v. Citizens Gas Co.*, 46 Fed. (2d) 855, where among other things, the court said: "Municipal corporations at the time of these transactions were authorized by the law of Indiana to purchase, construct, and operate gas plants, and the property so acquired was held as the property of the municipal corporation for public use, and charged with a public trust, of which the inhabitants of the city were the beneficiaries. *Lake County Water & Light Co. et al. v.*

² *Hamilton Gas Light &c. Co. v. Hamilton, Ohio*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90.

Walsh, 160 Ind. 32, 65 N. E. 530, 98 Am. St. Rep. 264. We think, therefore, that under Indiana law the establishment and operation of a gas plant was a proper object of a public charitable trust. In our opinion, nothing was decided in *Consumers Gas Trust Co. v. Quinby* (C. C. A. 7), 137 Fed. 882, which is inconsistent with this view. * * * The municipality, by means of such conditions, may impose obligations upon the company which it would have no power or authority to impose under its general charter powers, and, if the company accepts the grant, it is bound by the conditions, and is estopped to question their validity."

§ 36. **Convention hall.**—The case of *State v. Barnes*, 22 Okla. 191, 97 Pac. 997, decided in 1908, reflects the spirit of the court of the state of Oklahoma and illustrates the comprehensive scope of its constitution in sustaining the power of the city to erect a convention hall on the ground that it is a public building to be used to accommodate any public gathering of the people of the city, the court saying: "Such act of the legislature is a contemporaneous legislative construction of said section 27 of article 10 of the Constitution of this state, and clearly declares it to be the judgment of the legislative department of the state that the term 'public utilities,' as used in that section of the constitution, includes convention halls. If the court had reason to doubt that a convention hall of the character, and constructed for the purpose and controlled in the manner, of the one in the case at bar is to be a public utility within the meaning of said section of the constitution, such act of the legislature would be persuasive upon this court. In a government where the right of public assembly for the redress of grievances is guarantied to the people, where the policies of government are in a great measure determined at public gatherings of the people in political conventions, where the lecture platform has become so important a factor in public education, and where people frequently assemble for the purpose of discussing and devising ways and means of promoting their varied interests, a place in large cities where such gatherings may be had under comfortable hygienic conditions is not only a public convenience, but a public necessity."

In sustaining the power of a municipal corporation to erect a public auditorium because this is a public purpose, although not an expense necessary to municipal activities, the court in the case of *Adams v. Durham*, 189 N. Car. 232, 126 S. E. 611, said: "The erection of a public auditorium, while it may not be a nec-

essary expense, is to our minds undoubtedly a public purpose, and it has been so directly held in well-considered cases on the subject. * * * And the city authorities, having funds already on hand, clearly have the right to erect such a building in the exercise of the powers conferred upon them, both by the general law and provisions of the charter applicable."

Under a proper municipal ordinance a municipality was authorized to erect a public auditorium which would include a fire station and chambers for its municipal court and city council as well as the city jail and offices for its city officials and records, because the purpose was municipal and, although the public auditorium may not be an absolute necessity, it was permitted because it would serve a useful purpose as a meeting place for the inhabitants. Such is the effect of the decision in the case of *Shull v. Texarkana*, 176 Ark. 162, 2 S. W. (2d) 18, the court expressing its opinion as follows: "The ordinance specifies a bond issue of \$300,000 for the erecting, equipping, and furnishing a municipal building, which shall contain a public auditorium, a fire station, a city hall, a chamber for the municipal court and city council, and offices and vaults for the city officials and records. * * * A municipal building was to be erected on lots belonging to the city. The ordinance provided that the building should contain a public auditorium, a fire station, a chamber for the municipal court and city council, a city jail with an office for the police force, and offices and vaults for the city officials and records. All these matters related to the proper equipment of a city hall for the purpose of administering the city government. Under the provisions of the constitutional amendment, the majority of the qualified electors might vote for the construction and equipment of city halls, auditoriums, etc. * * * While it can not be said that a public auditorium is an absolute necessity to the proper administration of the city government, it is useful and necessary so that the inhabitants of the city may have a place to meet and discuss their municipal affairs."

§ 37. **Public wharves.**—In the case of *Burlington v. Central Vermont R. Co.*, 82 Vt. 5, 71 Atl. 826, decided in 1909, in upholding the right of the municipality to construct public wharves on navigable waters because the purpose is municipal, while recognizing that no valid law can be passed to raise a tax unless the purpose for which it is collected is a public or municipal one, the court said that: "What is a municipal purpose within that meaning is a question for the legislature to decide, and

concerning which it has a large discretion, which the courts can control only, if at all, in very exceptional cases."

§ 38. **Municipal fuel yards.**—Under a statute in Maine by virtue of which a municipal corporation was authorized to establish and maintain a permanent wood, coal, and fuel yard for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants, the city of Portland by proper legal proceedings voted to establish such coal and fuel yard for the purpose of selling fuel to its inhabitants at cost and provided that the money necessary for this purpose should be raised by taxation. In sustaining the power of the city to take this action and to raise funds by taxation for this purpose on the theory that the establishment of such a fuel yard for its inhabitants was a municipal or public purpose the court in the case of *Laughlin v. City of Portland*, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, said: "The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today. * * * On the other hand, what could not be deemed a public use a century ago may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now. * * * If, then, science has advanced so far that the heating as well as the lighting of houses by electricity were now a practicable method, there would seem to be no doubt that this also would fall within the realm of public purposes. The heat would be conducted from the central power station by means of wires along or under the public streets, the same as light is now. Or suppose it were practicable to install a central heating plant and conduct the heat through pipes in the streets to the various buildings, much the same as water or gas is now conducted, we see no reason why this too should not be called a public use. Just here, however, the petitioners contend for a distinction between all these illustrations and the case at bar. They say that, in the case of the distribution of water and of light and heat by gas or electricity, the use of the public highways is required for the mains and the poles and wires; that the purpose is public because it is necessary to obtain permission from public authori-

ties, either state or municipal, in order to carry it out. We grant that in those cases this element of public permission exists, but it does not follow that the converse is true, and that no purpose is public, where such permission does not exist. How can this criterion be applied to the erection of public buildings, the creation of a park, the building of a memorial hall, or of a market house, or the maintenance of a public clock? In other words, under this rule, public service of this sort would be limited to one which can only be performed by a so-called public service corporation; and not by an individual or corporation, independent of chartered rights. This is, in our judgment, too narrow. It makes an incident to some forms of public service an essential element. It transforms the method or means of rendering the service into the essence of the service itself. It makes the exercise of public rights in supplying the necessities of a community a prerequisite to the public use. But this exercise of public rights can itself be authorized only by the legislature, and, if that branch of the government sees fit to bestow the public service in a manner that may obviate the use of the public right, they certainly should have the right and the power so to do. It is a matter within their control. Let us look at the question from the practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and a simpler mode of distribution, and, if the legislature has the power to authorize municipalities to furnish heat to its inhabitants, 'it can do this by any appropriate means which it may think expedient'. The vital and essential element is the character of the service rendered, and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways, but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legis-

lature, which is the only question before the court, and not the wisdom of its exercise, which is for the legislature alone. Cases directly in point are lacking. We have been unable to find anywhere that the issue has been squarely decided. * * * The principle, therefore, seems to be conceded that, if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned textwriters. Dillon, *Municipal Corporations* (5th edition), section 1292; McQuillin, *Municipal Corporations* (1912), section 1809. * * * In the case of fuel, the practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation, and distribution of coal has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of a few. The difficulty and practical impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage in quantity. All this is a matter of common knowledge and can not be overlooked by the court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use. * * * But it is urged: Why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market, or a bakery? The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise, for which there may be many substitutes, but with an indispensable necessity of life; and, more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition, in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle, it would be our duty to pronounce the act unconstitutional, but, in our opinion, it does not. The element of commercial enterprise is entirely lacking. * * * It requires no argument to prove that coal is as

conducive to the health, comfort, and convenience of the inhabitants of this northern latitude as is ice to that of the inhabitants of Georgia."

That municipalities may engage in the sale of oil and gasoline to owners of automobiles as a municipal purpose for the benefit of the inhabitants and as a means of providing for their transportation by automobiles is the effect of the decision construing a city ordinance of the city of Lincoln which, under the state constitution, has the force and effect of an act of the legislature. In extending the activities of municipal corporations to include filling stations which, the court held is a proper public purpose of such corporations, another striking illustration of the attitude of our courts toward an increase of the sphere of municipal activities is furnished in the case of *Mutual Oil Co. v. Zehrung*, 11 Fed. (2d) 887, where the court held that: "The claim that the plaintiff holds an implied contract to be free from competition in the conduct of its business can not be sustained. It engaged in business under the usual conditions which surround private commercial enterprises. Restrictions by ordinance usually attend all such lines of business conducted in cities, and the grant of a mere right to install a storage tank or to conduct its business at a designated place can not be said to be a grant of a right to be free from competition, especially as the grant provides that it is temporary and revocable at the discretion of the city council. A grant by a municipal corporation of a formal franchise to a person or corporation to conduct its business within the municipality does not grant a right to be free from competition, even from the conduct of a similar business subsequently entered into by the municipality, in the absence of a contract for such an exclusive privilege although such competition impairs the value of the grantee's property. * * * There are some analogies between the sale of gasoline and the sale of electricity by a municipality. Electric power may be used to propel one class of automobiles, and gasoline to propel another. Electricity is somewhat used for heating purposes, and gasoline is also used as a method of producing heat. Some municipal corporations operate a street railway system by means of electricity, affording a means of transportation which could be indirectly served by the sale of gasoline to owners of automobiles. But in the development of the present uses of gasoline it may be conceded that the principal uses of the gasoline and oil which the city of Lincoln would sell would be for the operation of automobiles and of stationary internal combustion engines. Is

the conduct of this business by the city a violation of the plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States? * * * The use of gasoline and oil in our modern life as a means of transportation for automobiles and tractors is so common and general that the general welfare of a municipality or a state may well be said to depend upon it. While the validity of this particular power given to the city of Lincoln has not been passed upon by the Supreme Court of Nebraska, it has been approved by the legislative authority of the city of Lincoln, which has been empowered by the state Constitution to make enactments that have the force of an act of the legislature. * * * As it has been held that this is a proper public purpose for which money raised by taxation may be used, it must be held to be one of the proper functions of local government."

§ 39. **Heating plant.**—In holding that under the statute of Maine, upon which the case of *Laughlin v. Portland*, supra,³ was sustained, the city of Portland had the power to maintain and operate a heating plant for its inhabitants because such is a public or municipal purpose for which money may be raised by taxation, the court in the case of *Jones v. Portland, Maine*, 245 U. S. 217, 62 L. ed. 252, 38 Sup. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E 660, after fully sustaining the decision in the case of *Laughlin v. Portland*, said: "The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the state, upon the authority of a previous decision of that court. *Laughlin v. Portland*, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734. * * * Bearing in mind that it is not the function of this court, under the authority of the Fourteenth Amendment, to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private. The authority to furnish light and water by means of municipally owned plants has

³ Section 38.

long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort, and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in *State v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a state authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the state to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States."

§ 40. **Manufacturing cement.**—That the manufacture of cement is not a public purpose for which money may be raised by taxation is the effect of the decision in the case of *Los Angeles v. Lewis*, 175 Cal. 777, 167 Pac. 390, as follows: "Indisputably, if the legislature has authorized the doing of this thing, its authorization, under all the authorities, is void. * * * Respondents do not contend—no one contends successfully—that the manufacture and sale of Portland cement for commercial purposes is work of a public or municipal character, any more than would be the manufacture of bricks, the manufacture of harness, of fire engines, of ventilating apparatus, or the many hundreds of manufactured products which a municipal corporation may use in the furtherance of public affairs."

§ 41. **Motion pictures.**—That municipal corporations may not own and operate moving picture shows under their powers of local self-government is decided in the case of *State v. Lynch*, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949. "The suggestion that moving picture exhibitions might be made educational is gratuitous, because that is not their natural object. It is unavailing because article 6 of the Constitution shows that education supported by taxation is to be conducted by a 'system of common schools throughout the state.' Among those who have attentively studied the functions of written constitutions it was accepted as a sound propo-

sition that a municipality might own and operate only such utilities as it used in its municipal operations. Those who are responsible for this amendment were aware that no enlargement of that capacity was denoted by the provisions of the third section, that 'municipalities shall have authority to exercise all powers of local self-government,' and therefore they employed the express language of the later section of the article to confer that capacity with respect to other utilities. And as to them there are provisions to safeguard the interests of the people, while capacity to operate amusements, if conferred at all, is conferred without restriction. If the language of this instrument were so doubtful as to require construction, a most natural question would occur, and the answer to it would be inevitable. Could we rationally impute an intention to authorize such use of the public money to those who were seeking to reduce the cost of municipal government and the consequent burdens of taxation? The conclusion that this would be an unauthorized use of public money seems clearly to result from these considerations."

§ 42. **Liability insurance.**—That municipalities may contract for liability insurance for their protection in connection with the operation of their public utility plants the same as they may for fire insurance is decided in the case of *Travelers Ins. Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900: "When a municipality is engaged in operating a municipal plant, under an authority granted by the general law, it acts in a business capacity, and stands upon the same footing as a private individual or business corporation similarly situated. *Pond, Public Utilities*, section 11; 4 *McQuillin on Municipal Corporations*, section 1801; 3 *Dillon on Municipal Corporations* (fifth edition), section 1303.

* * * What reasonable distinction from the standpoint of economy can be drawn between fire and liability insurance? Damage from both forms of misfortune very often occurs. In one form of insurance protection to the works is given; in the other, protection to the utility itself, including the business. In each case, procuring insurance appears a wise means of protection against such loss. Such protection would be exercised by an ordinary business man. It has been expressly held that power to maintain a public building includes the power to contract for fire insurance. * * * There being no practical distinction in protecting a business from loss by fire and from loss by liability, we consider this case an authority in favor of the power of the village to make the contract."

§ 43. Ice plants.—That the city may produce ice and maintain warehouse facilities for the operation of its own wharves and docks but that it may not extend its activities to another business of a similar nature is the effect of the decision in the case of *State v. Seattle*, 104 Wash. 634, 177 Pac. 671, 180 Pac. 137, where the court held: "The business of the port in receiving, icing, reconditioning, and packing fish for reshipment at its wharves, docks, and warehouses is in aid of its public function, although done in a proprietary capacity. When it goes beyond the bound of its public engagement to take care of such business as does not naturally come to its terminals, it ceases to be a public functionary. It is then engaged in a strictly private business, and for that there is no warrant in the law either by express enactment or by implication, for the rule of construction is that any doubt as to the power of a municipal corporation must be resolved against the municipality; only such powers as are expressly granted or such as are necessarily incident to its granted power will be sustained, for the policy of the law has always been to limit rather than to extend the proprietary functions of a municipal corporation. *State v. Bridges*, 87 Wash. 260, 151 Pac. 490; *State v. Bridges*, 97 Wash. 553, 166 Pac. 780. * * * The power to sell a surplus product by a municipal corporation is allowed only where the municipality has built in reasonable anticipation of its future needs, or, as in the *Chandler* case, dammed or curbed the whole of a stream to meet proper engineering conditions, or has a variant surplus in excess of its needs from day to day, but created with reasonable expectations of using it for its own purposes. The fault here, and we understand it to be frankly admitted, is that the appellant was not bound to build the whole to attain the part that it would need in the prosecution of its own affairs. It deliberately built a plant knowing that it had a capacity far beyond its present demands and beyond any demand that might be anticipated within any reasonable future time. It built to manufacture at will with the expectation of selling ice as a commodity, and not as an incident to its business or its present or reasonably prospective engagements with its patrons."

The manufacture and sale of ice, however, is not such a business as may be charged with a public use and regulated as a public utility. Indeed, it is an ordinary private enterprise which may be conducted like any other similar business and, because it is concerned with a private utility or product rather than a

public one, the state can not limit or restrict those who wish to undertake it, for as the Supreme Court of the United States said in the interesting case of *New State Ice Co. v. Liebmann*, — U. S. —, 76 L. ed. 747, — Sup. Ct. —: “Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home.”

That a municipal corporation may furnish ice to its inhabitants without objection by a privately owned ice plant is established in the case of *Edenton Ice & Cold Storage Co. v. Plymouth*, 192 N. Car. 180, 134 S. E. 449: “The court below found as a fact that the defendant sells the ice to its own citizens; there is no evidence that it has made any sales to people living outside the town. Of course the findings of fact are not binding upon us in a matter of this kind, but they are presumed to be correct, and upon an examination of the entire record we approve the judge’s finding in this respect. If the defendant’s sales are confined to its own citizens, it necessarily follows that such sales do not per se constitute an invasion of the plaintiff’s legal rights under the doctrine announced in the decisions relied on by the plaintiff.”

In a case holding that municipal corporations may engage in the manufacture and sale of ice under the statutory authority to “manufacture its own electricity, gas, or anything else that may be needed or used by the public,” we find a striking illustration of the attitude of our courts favoring the increase of the sphere of municipal activity. Under this decision a home-rule municipality would have the capacity to furnish practically any article “needed or used by the public” under similar statutory provisions, for the court expressly finds statutory authority to manufacture and sell ice under the above statutory provision although it is not mentioned expressly. While the court finds it unnecessary to decide whether furnishing ice is a public util-

ity, it permits the municipality to engage in this line of activity for the reason that ice is a necessity for the public use.' Under the reasoning of this case, apparently, municipal corporations may provide practically any public necessity, which logically may be held to include many articles formerly regarded as luxuries, which are now defined as necessities, in line with the industrial inventions and developments in order to meet social and economic requirements. In the course of this decision the court very properly said that the question of the wisdom or policy of the law in extending such powers to municipal corporations is not judicial, and having found that such statutory provisions are constitutional and after construing them to include the power in question, the court properly concluded that it had no power to interfere with the municipality in the exercise of such powers or to attempt to deal with the policy of such action. This liberal construction of the statutory powers of municipal corporations is found in *Denton v. Denton Home Ice Co.*, 119 Tex. 193, 27 S. W. (2d) 119, where the court said that: "In our original opinion we held, in effect, that ice was a public utility. On more mature consideration of the question here certified we have reached the conclusion that it is not necessary to a decision of this case to decide whether ice is a public utility within the common acceptation or meaning of that term.

* * * Article 1175, R. C. S. of Texas, provides: * * * 'Enumerated powers—Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty: * * * 14. To manufacture its own electricity, gas, or anything else that may be needed or used by the public; to purchase and make contracts with any person or corporation for the purchasing of gas, electricity, oil or any other commodity or article used by the public and to sell the same to the public upon such terms as may be provided by the charter.' * * * An examination of subdivision 14 of article 1175, *supra*, shows that a home-rule city is expressly given the right and authority to manufacture 'its own electricity, gas or anything else that may be needed or used by the public.' If ice is a thing 'needed or used by the public' within the meaning of subdivision 14 of article 1175, *supra*, then the city of Denton, as a home-rule city, has express statutory authority to manufacture, distribute and sell ice. The legislature of this state has seen fit to mention by name numerous things that a home-rule city can do,

but the legislature, evidently taking into consideration the fact that it is well-nigh impossible by name to enumerate all the things 'needed or used by the public,' has provided that such cities may manufacture 'anything else that is needed or used by the public.' The legislature has not seen fit to define the things 'needed and used by the public,' because in the very nature of such things they must change to suit industrial inventions and developments, and to meet changing social and economic conditions. *City of Tombstone v. Macia*, 30 Ariz. 218, 245 Pac. 677, 46 A. L. R. 828. It can hardly be said, under our modern industrial, social, economic, and domestic conditions and customs, that ice is not a thing needed and used by the public. In fact it is now so generally needed and used that it is a public necessity. Ice is now used in practically every home, office, store, manufacturing plant, and by nearly all people under all circumstances and in all walks of life. It is a necessity for the well, as well as the sick, and even the most humble laborer while at work is usually furnished ice in his drinking water. In fact, under our modern conditions, ice is almost universally used by our people. This being the case, we think there can be no doubt but that ice is a thing 'needed and used by the public' within the meaning and contemplation of subdivision 14 of article 1175, supra. * * * We therefore hold that the manufacture, distribution and sale of ice is so related to the necessities, health, and convenience of the inhabitants of the city and so generally used as to come within the meaning of subdivision 14 of article 1175, supra. In other words we hold that ice is 'a thing needed and used by the public,' within the contemplation of said statute. * * * Also under article 1176, supra, the fact that the legislature has enumerated certain powers by name, and has not seen fit to include the power to manufacture and sell ice among such named powers, does not, by implication, preclude the city from exercising such power; this by reason of the express provision of the article last referred to. The action of the city in this case is characterized as socialistic and unwise. It is not within the province of this court to pass on the wisdom of the law or the wisdom of the city in exercising its powers thereunder. The power has been conferred on the city, and the statutes and charter provisions so conferring said powers are not in violation of the Constitution of the United States or of this state. Such being the case, the courts have no right to interfere."

§ 44. **Definitions.**—The term “public utility” and the limitation and application of the term “municipal or public purpose” is well defined and applied to specific matters in the case of *Dunagan v. Red Rock*, 58 Okla. 218, 158 Pac. 1170, P. U. R. 1916F, 980, where the court said: “We have had frequent occasion to decide what constituted a public utility within the meaning of the constitution. In *State v. Miller*, 21 Okla. 448, 96 Pac. 747, sewers were held to be a public utility. In *State v. Barnes*, 22 Okla. 191, 97 Pac. 997, a convention hall, owned, controlled, and used exclusively by the city, to accommodate public gatherings of the people of the city, and for such other purposes as might be designated by the city authorities, was held a public utility. In *Barnes v. Hill*, 23 Okla. 207, 99 Pac. 927, and *City of Ardmore v. State*, 24 Okla. 862, 104 Pac. 913, public parks were held to be public utilities. In *Coleman v. Frame*, 26 Okla. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556, it was held that the term ‘fire department improvements’ may include items of public utility, but that it also includes others that are not; that all such property purchased and to be exclusively owned by the city may well be classed as public utilities. In *Oklahoma City v. State*, 28 Okla. 780, 115 Pac. 1108, bonds for the purpose of erecting and equipping public fire stations and equipment therefor, to be devoted to the public use, and to be owned exclusively by the city, were held to be embraced within the term ‘public utilities.’ An electric light plant, to be owned exclusively by the city, was held, in *City of Woodward v. Raynor*, 29 Okla. 493, 119 Pac. 964, to constitute a public utility.

* * * A system of waterworks, owned by a municipal corporation, has a relation directly to public purposes, and for the public, and appertains to the corporation in its political or governmental capacity. It is subject to the exclusive control of the town or city, and for the convenience, health, and general welfare of the inhabitants and property owners of the municipality. The town or city determines the source of the water supply, the amount of water mains, where to be laid, and the number and location of fire hydrants, and other details of the water system. Over it the individual has no control. That water may be furnished inhabitants of a town or city, for private domestic purposes in no wise affects the character of a public waterworks as a public utility.”

Where authority is granted for the construction and operation of a pipe line for the transportation of gas for the exclusive use of one plant, the court properly held this language was not

sufficient to constitute the concern a public utility, although its charter authorized it to operate as such. For as the court said in the case of *Citizens Pipe Line Co. v. Twin City Pipe Line Co.*, 178 Ark. 309, 10 S. W. (2d) 493: "This language indicates no intention to grant a general franchise for supplying gas to all the consumers, both industrial and domestic, in the city of Fort Smith, who might desire to contract with the appellant company for use of gas, but is limited and restricted to the construction and operation of the pipe line and to transportation of gas for the consumption and use of the Harding glass plant only. * * * The fact that its charter authorized it to own and control pipe lines for the transportation and sale of gas to operate as a public utility, was not sufficient to constitute it a public utility."

In the case of *Jonas v. Swetland Co.*, 119 Ohio St. 12, 162 N. E. 45, the court properly held a realty company, furnishing electrical current to its tenants under private contract and not undertaking to serve the public at large, not to be a public utility so that there was no obligation to serve all at a regulated rate, for as the court said: "There being no evidence in the record that the realty company had dedicated its property to the public service, nor had been willing to sell current to the public, under the holding of this court in *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808, the Swetland Company is not a public utility. * * * Not being a public utility, the Swetland Company can not be compelled to furnish electricity except pursuant to the terms of its voluntary contract. The petition asks that the Swetland Company be forced to furnish electric current at a price to be fixed by the court, which is less than the price voluntarily agreed upon by Jonas and the Swetland Company as one of the terms of the lease and as part of the consideration thereof. To state this proposition is to state that the judgment of the Court of Appeals must necessarily be affirmed."

Where the company was only serving its stockholders and a certain class under contract with it, the court in the case of *Hinds County Water Co. v. Scanlon*, 159 Miss. 757, 132 So. 567, P. U. R. 1931C, 330, decided that such a company is not a public utility and may not be required to serve except upon its own terms as determined by the contract; the court saying in the course of its opinion: "The appellant company did not hold itself out to the public to serve any one within the area of service for a fixed compensation, but it served only its stockhold-

ers and a very limited number of nonstockholders of a certain class with whom it had fixed contractual relations. Under these circumstances and upon all the facts shown by the record, as stated herein, we do not think the appellant company comes within the classification of a public utility and we think it has the right to fix the terms upon which it will supply water to the appellee."

The fact that a contract is executed in each particular case for the transportation of merchandise so long as the service is available to any responsible party requesting it does not prevent the enterprise from being a public utility and subject to regulation as such, for as the court said in the case of *Breuer v. Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623: "Breuer admitted that he would execute a contract with any one who had merchandise to be transported, and that it was only a question of the patron agreeing to his terms, and the patron being a responsible person. Obviously it was necessary that the patron be a responsible person, because he did not collect in advance; neither did he collect upon delivery of the merchandise. * * * The decisive feature of the case is, as admitted by him, that he would enter into a contract with any responsible person for a single transaction to the limit of the capacity of his equipment. This comes clearly within the definition laid down by all the authorities, many of which were cited in *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808. The commission having found that he was a common carrier, and therefore subject to regulation, its order must be affirmed."

While recognizing that the effect of holding that property has been dedicated to a public use and is therefore subject to public regulation and control "is not a trivial thing," the courts do not hesitate to regard the furnishing of water available to the public living adjacent to a canal to be a public purpose, which is accordingly subject to public regulation, as is indicated in the case of *Babcock v. C. W. Clarke Co. (Cal.)*, 2 Pac. (2d) 155, where the court said: "Examination of this notice of appropriation will disclose that it was not the intention of the appropriators to abandon the water after the same was diverted into said canal, but, on the contrary, it was their purpose to retain dominion over it and supply all that portion of the public, particularly in Big Valley, as were so situated as to avail themselves of the water supply afforded by said canal. The intention is specific that the waters are 'to be sold and used for agricultural, domestic and mechanical purposes.' * * * This in-

tent, coupled with the actual carrying out thereof for a continuous period of twenty-six years, makes out a clear case of amply sufficient evidence to warrant the conclusion reached by the court below. * * * In coming to this conclusion, we are not unmindful of the caution with which we should proceed to declare that a property right has been dedicated to a public use, as enjoined by such language as this: "To hold that property has been dedicated to a public use is "not a trivial thing"'. * * * We are entirely satisfied, however, that the facts before us here remove this cause from the zone of influence exerted by those cases."

In holding that a person hiring out an automobile by the hour under special contract is not rendering service as a public utility and not subject to the regulation of public utilities requiring taxi-meters to be installed, the court in the case of *Bell v. Harlan*, 20 Fed. (2d) 271, 57 App. D. C. 255, spoke as follows: "This contention must be overruled, for the reason that plaintiff was denied a license to operate his automobile upon the streets of the district, and consequently he can not secure a legal test of the orders in question without first violating the regulations requiring such a license. A separate penalty is prescribed for such violation. It can not be said that plaintiff, under these circumstances, has a plain, adequate, and complete remedy at law. We must therefore inquire whether the disputed orders are applicable to plaintiff's business, and, if so, whether they are valid. * * * The question arises whether plaintiff is a common carrier within the sense of these definitions. Plaintiff alleges in his bill that he is engaged in the business of hiring out his seven-passenger sedan automobile and his services in and about the District of Columbia to person or persons by the hour or by special charter contract; that he does not hire out his car and services by the mile, but only by hourly rates lower than the maximum legal rate now in force in the District of Columbia and by special charter contract; that his car is not a taxicab, and does not have the appearance of one, but is a large seven-passenger sedan automobile, personally owned by plaintiff, and that the enforcement of the order for a taxi-meter would seriously detract from the suitability and attractiveness of his car as an automobile for hire for private charter parties; that plaintiff's business comes chiefly from patrons desiring to hire a car having all the appearance of a private automobile. These allegations are not denied, and they sustain the claim that plaintiff's business is not a public utility within the intent

of the Public Utilities Act. * * * We think the instant case is governed by the foregoing ruling, and accordingly we sustain the plaintiff's contention that the Public Utilities Commission had no jurisdiction to enforce its foregoing orders against plaintiff's business, and for that reason we affirm the decree of the lower court without passing upon the other questions appearing in the record."

In holding unconstitutional an Oklahoma statute, empowering the corporation commission to issue licenses to individuals for the operation of cotton gins only in case the commission finds public convenience and necessity justifies such action, while at the same time permitting certain corporations to engage in the same business without such regulations, and in holding such a classification to be arbitrary, the United States Supreme Court, in the case of *Frost v. Corporation Commission of Oklahoma*, 278 U. S. 515, 73 L. ed. 483, 49 Sup. Ct. 235, P. U. R. 1929B, 634, said: "By a statute of Oklahoma, originally passed in 1915 and amended from time to time thereafter, cotton gins are declared to be public utilities and their operation for the purpose of ginning seed cotton to be a public business. Comp. Stat. 1921, section 3712. The commission is empowered to fix their charges and to regulate and control them in other respects. Section 3715. No gin can be operated without a license from the commission, and in order to secure such license there must be a satisfactory showing of public necessity. * * * It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment. * * * By the terms of the statute here under consideration, appellant, an individual, is forbidden to engage in business unless he can first show a public necessity in the locality for it; while corporations organized under the Act of 1919, however numerous, may engage in the same business in the same locality no matter how extensively the public necessity may be exceeded. That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced. * * * As a basis for the classifica-

tion attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

In holding that the regulation of the sale and the price of theater tickets is not so affected with the public interest as to justify legislative regulation, the United States Supreme Court spoke as follows in the case of *Tyson & Bros. v. Banton*, 273 U. S. 418, 71 L. ed. 718, 47 Sup. Ct. 426: "The contention that, historically considered, places of entertainment may be regarded as so affected with a public interest as to justify legislative regulation of their charges, does not seem to us impressive. It may be true, as asserted, that, among the Greeks, amusement and instruction of the people through the drama was one of the duties of government. But certainly no such duty devolves upon any American government. The most that can be said is that the theater and other places of entertainment, generally have been regarded as of high value to the people, to be encouraged, but, at the same time, regulated, within limits already stated. While theaters have existed for centuries and have been regulated in a variety of ways, and while price fixing by legislation is an old story, it does not appear that any attempt hitherto has been made to fix their charges by law. * * * If it be within the legitimate authority of government to fix maximum charges for admission to theaters, lectures (where perhaps the lecturer alone is concerned), baseball, football and other games of all degrees of interest, circuses, shows (big and little), and every possible form of amusement, including the lowly merry-go-round with its adjunct, the hurdy-gurdy (*Com. v. Bow*, 177 Mass. 347, 58 N. E. 1017), it is hard to see where the limit of power in respect of price fixing is to be drawn."

§ 45. **Airports.**—One of the most interesting and striking illustrations of the attitude of our courts toward an increase of the sphere of municipal activity is found in their treatment of

the power of municipal corporations to establish and maintain airports. While the municipalities have not been permitted to erect or maintain and operate steam or interurban stations in connection with their municipal activities, practically all the courts, in passing on the question, have found that municipal corporations have the power and are authorized to provide and operate airports, involving extensive expenditures in acquiring large tracts of land within or near the city limits and in the erection of substantial airport stations and landing fields. In sustaining the action of municipal corporations in erecting and maintaining airports, the courts hold that the encouragement of aerial service for the transportation of passengers, mail, and other commodities is a legitimate municipal purpose for which funds may be raised by general taxation or the sale of municipal bonds. In so holding, the courts recognize that transportation by air is rapidly becoming of the greatest importance and interest and that an airport, owned by a municipality, available to all its inhabitants, is for the general benefit of the community and is a proper municipal purpose or public utility which may be maintained by municipal funds. Some of the courts base their decisions on the theory that enjoyment by the public of airplane exhibitions is a legitimate municipal purpose for the education and entertainment of the people. The decisions all seem to recognize the importance of fostering this new method of rapid transportation, as they realize that its encouragement by municipal corporations is a proper extension of the sphere of municipal activities. It is evident that the spirit of competition between cities and the desire of each to keep in touch with the best available methods of transportation has been the underlying motive for initiating much of this activity and bids fair to continue the competitive feature of the enterprise.

The progress in recent years in this connection has been so rapid and the standardization of service and equipment so marked as to justify the expectation that the next few years will provide a complete and comprehensive system of air transportation, which will be generally available. To encourage such an enterprise would seem in the best interest of the public generally and would seem to justify the necessary municipal expenditures for airports and landing fields. It furnishes at once a dramatic and rapid method of transportation which seems to have a universal appeal, so that the extent of its usefulness will be determined largely by the inventive genius in providing safe

and economical equipment, which will popularize its use and make it generally available. How far municipalities can be permitted to go in extending this service, which is naturally more intercity and interstate than local, is the legal question to be determined by legislatures on matters of policy and by the courts as to questions of legal capacity. Questions of municipal control, ownership, or operation of air service and radio broadcasting are currently the most interesting and far-reaching features of our present day progress.

The power of municipal corporations to raise funds by the sale of bonds for the erection and operation of airports in connection with their power systems under constitutional authority, empowering such corporations to maintain and operate "transportation systems, heating plants, incinerating plants and other public utilities or works or ways local in use," is discussed in one of the first cases, which is the leading one of *Ruth v. Oklahoma City*, 143 Okla. 62, 287 Pac. 406, in which the court said: "In the third specification of error, it is urged that the court committed error in holding that the defendant city has power, under its charter, to issue its bonds for the purpose of providing funds for the acquisition of lands for park purposes, with the privilege of locating aviation airports thereon. The petition alleges that section 5, art. 1, of the charter, provides: 'Said city shall have the power within its territorial limits, and within 15 miles from the said limits, to construct, condemn and purchase, acquire, lease, improve, add to, maintain, conduct and operate in whole or in part waterworks, light plants, telephone systems, power plants, transportation systems, heating plants, incinerating plants and other public utilities or works or ways local in use.' * * * In the case of *McClintock v. City of Roseburg*, 127 Ore. 698, 273 Pac. 331, the Supreme Court of Oregon held that the establishment and maintenance of an airport by a municipality was a public enterprise, for which the municipality could issue its bonds. There it was said: ' * * * Transportation by air appears to be increasing so rapidly that we may confidently expect that soon a large portion of the mail and express will be transported by airplane. An airport owned by the city open to the use of all airplanes is for the benefit of the city as a community, and not of any particular individuals therein. It is therefore a public enterprise. * * * ' In the case of *City of Wichita v. Clapp*, 125 Kans. 100, 263 Pac. 12, 63 A. L. R. 478, it was held that the use of a reasonable portion of a public park for an aviation field comes

within the legitimate uses for which public parks are created. In that case the Supreme Court of Kansas said: 'The devotion of a reasonable portion of a public park to airport (aviation field), for recreation and other attendant purposes, comes within the proper and legitimate uses for which public parks are created.' In the Wichita Case, it was expressly held that land acquired for park purposes by the city could include an airport or landing field for airplanes. Since the city of Oklahoma City had authority to issue its bonds for the purpose of acquiring a park, under the rule announced in the Wichita Case it follows that it has authority to devote a reasonable portion of the park for use as an aviation field. * * * Whether or not an aviation airport is a public utility is not now before us for consideration. If it is a public utility, then bonds for airport purposes could be issued under section 27, art. 10, of the Constitution. If it is not a public utility, then they can only be issued within the limitations contained in section 26, art. 10, of the Constitution. As to this question we are expressing no opinion."

An early, leading case sustaining the power of municipal corporations to acquire and control municipal airports as being a public purpose within the meaning of the constitutional principle on the subject is furnished in the case of *Dysart v. St. Louis*, 221 Mo. 514, 11 S. W. (2d) 1045, where the court said: "In this connection it should be further said that the ordinance in question in this case is in no way violative of either the section of the Constitution last referred to or related sections. See *Haeussler v. St. Louis*, 205 Mo. 656, 683, 684, 103 S. W. 1034. The question of whether the acquisition and control of a municipal airport is a public purpose within the purview of the constitutional principle heretofore adverted to is obviously a new one. The courts which have had occasion to consider it have, however, answered in the affirmative. *City of Wichita v. Clapp*, 125 Kans. 100, 263 Pac. 12; *State ex rel. City of Lincoln v. Johnson*, State Auditor (Nebr. 1928), 220 N. W. 273; *State ex rel. Hile v. City of Cleveland et al.* (Ohio Ct. App. 1927), 160 N. E. 241; and no court of last resort, so far as we are advised, has ever held the contrary. Not only that, but the governmental nature of the function involved is given tacit recognition in numerous recent statutory enactments, both state and federal. * * * The building of a bridge connecting the cities of New York and Brooklyn by those cities, was held to be a city purpose as to each. *People v. Kelly*, 76 N. Y. 475, 487. It was also held by this court that the building of a bridge across the Mississipp-

pi River at St. Louis for the benefit of the public, by the City of St. Louis, was a public city purpose. *Haeussler v. St. Louis*, 205 Mo. 656, 103 S. W. 1034. An airport with its beacons, landing fields, runways, and hangars is analogous to a harbor with its lights, wharves and docks; the one is the landing place and haven of ships that navigate the water, the other of those that navigate the air. With respect to the public use which each subserves they are essentially of the same character. If the ownership and maintenance of one falls within the scope of municipal government, it would seem that the other must necessarily do so. We accordingly hold that the acquisition and control of an airport is a city purpose within the purview of general constitutional law."

Under an ordinance providing for the improvement of a site and for the establishment of an airport, the construction of a city hall and a municipal auditorium, which was submitted and adopted as required by its terms, the Missouri court held that the appropriation provided for by the ordinance was not intended to be used for the acquiring of a site but only for its improvement; and as there was no site then available for the purpose, the court concluded that there was no proper authority or opportunity for proceeding under the ordinance, and in its decision in the case of *Meyer v. Kansas City*, 323 Mo. 200, 18 S. W. (2d) 900, said: "When Ordinance No. 55,585, in which the proposition here under review is incorporated, was submitted to and adopted by the people, eight distinct propositions were embodied therein. In three of these it was expressly provided that a portion of the amounts appropriated were to be applied to the purchase of a site for the establishment of the contemplated improvement. Those three propositions were for the establishment of an airport; the construction of a city hall; and municipal auditorium and each of these it is evident from the nature of the proposed improvement that it could not be established without a site therefor first having been procured. Despite this apparent fact and the consequent implied power of the city to purchase the sites, it was prescribed that a portion of each of the appropriations in the cases referred to should be used for such purpose. No such use of the appropriation under the eighth proposition is authorized. The nature of the proposed improvement is not of such a character as to render an express provision for the purchase of a site necessary. While the record is silent on the subject, the inference is permissible that the city possesses or controls the docks and wharves within its corporate

limits. In the absence of such possession, it is not reasonable that the approval of the voters would have been sought to construct, improve, and equip something which the city did not possess. * * * Recognizing this fact, it is evident that the framers of the ordinance, and the voters in approving the same, understood that the plain terms of proposition 8 contemplated that the appropriation was to be used, not for the acquiring of a site nor for extending the area of same, but to construct, improve, and equip the site then possessed and controlled by the city. Any other interpretation of the proposition can not be made without judicial legislation, which would necessitate the interpolation of language to this effect: 'for a site' or 'to procure a site.' The ordinance, No. 55,585, in which proposition 8 appears, contains no grant of power, other than that clearly comprehended within the words employed. There is no room, therefore, for the application of the doctrine of implied powers. This is especially true of a grant of powers to a corporation, municipal or otherwise, and if any doubt arises out of the use of the words employed, it is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made. *State ex inf. Harvey v. Missouri Athletic Club*, 261 Mo. 576, 598, 170 S. W. 904, L. R. A. 1915C, 876, Ann. Cas. 1916D, 931. Another general rule in the construction of statutes, applicable as well to municipal ordinances, is that acts of the character here under review are to be strictly construed."

This same court in deciding on the capacity of the city of Kansas City in construing the charter provisions "to regulate and control the location of aviation fields, hangars, and aircraft landing places; to regulate and control the use of all aircraft within or over the city," held that this city also had the right to acquire and maintain an airport and the power to issue bonds to provide funds for this purpose in the case of *Ennis v. Kansas City*, 321 Mo. 536, 11 S. W. (2d) 1054, the court saying: "A reading of the provisions quoted, in connection with the charter as a whole, indubitably shows that it was the purpose of the people of Kansas City to confer upon their municipality all of the powers that could possibly be delegated to a city, the limitations imposed by statutes and constitutions considered. The power to acquire and maintain an airport, being one which falls within the category of both a public and municipal purpose, as was held in *Dysart v. City of St. Louis*, 11 S. W. (2d) 1045, is therefore embraced within the general grant of power

to Kansas City. The specification of the power, 'to regulate and control the location of aviation fields, hangars and aircraft landing places; to regulate and control the use of all aircraft within or over the city,' does not under the rule of construction which the charter provides operate to limit the general power. Besides, the power to regulate and control the location of aviation fields and the uses of aircraft within and over the city can no doubt be most effectively exercised through the ownership and control of an airport. We accordingly hold that Kansas City is authorized by its charter to acquire and maintain an airport; and that being so authorized it can incur an indebtedness therefor through the issuance of bonds."

Among the early cases permitting municipal corporations to acquire and maintain airports, in the absence of express statutory provisions, on the theory that such an enterprise is a "city purpose" within the meaning of the constitution, and in recognition of the fact of the increasing importance of aviation, which is no longer experimental but is generally regarded as an established means of transportation, is the case of *Hesse v. Rath*, 224 App. Div. 344, 230 N. Y. S. 676, where the court held that: "Chapter 647 of the Laws of 1928, entitled 'An Act to amend the general municipal law, in relation to authorizing towns to establish, to construct, improve, equip, maintain and operate airports or landing fields,' was enacted to enable municipal corporations to acquire and maintain airports as therein provided. * * * The question for our determination is whether the establishment of an airport is a 'city purpose' within the meaning of section 10, art. 8 of the state Constitution, which provides: 'Nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes.' We may take judicial notice of the fact that aviation is no longer an experiment. Large sums of money have been expended and are being expended by the municipalities in providing suitable airports. Commercial and passenger lines have been established for the transportation of passengers, mail and express. Railroads have established schedules in connection with air transportation companies for the more rapid transportation of passengers and valuable express, and the government has availed itself of air transportation in carrying mail. * * * In view of such extensive development of aviation and the purposes for which air transportation is used, we believe that the legislature was justified in its determination that the building of an airport is a 'city purpose' as is

the building of a railroad, a bridge or a dock. At least, we are unable to say it is not a 'city purpose' and therefore the determination of the legislature is valid and constitutional."

The courts of Ohio were among the first to permit of the owning and operation of airports by municipal corporations, and, in construing statutory enactments authorizing municipalities to extend their activities to cover this field of municipal enterprises, these courts promptly construed such statutes as being entirely constitutional, because such purposes were regarded as being in the public interest and therefore municipal in their nature and scope of operation. The rule is well enunciated in the case of *State v. Cleveland*, 26 Ohio App. 265, 160 N. E. 241, where the court held: "By Section 3, art. 18 of the Constitution, all municipalities of this state have authority to exercise all powers of local self-government, and by section 4 of said article any municipality may acquire, construct, own, lease and operate within or without its limits, any public utility, the products or services of which are, or are to be, supplied to the municipality or its inhabitants. If there is any doubt as to the authority of the city, by the provisions of the Constitution hereinbefore quoted, to acquire, own and operate an air landing field, as contemplated by the ordinance under consideration, then all doubt must be removed by the enactment of the General Assembly of paragraph 15 of section 3677, Gen. Code, and paragraph 3939, Gen. Code, in which paragraphs express authority is conferred upon the municipalities of this state to do the things contemplated by such ordinance, which authority to confer such power the legislature no doubt has unless prohibited by some provision of the constitution, which prohibition we are unable to find."

The same court in construing statutory provisions providing for municipal airports as public utilities and therefore proper municipal purposes sustained such provisions in the later case of *State v. Jackson*, 121 Ohio St. 186, 163 N. E. 396, where the court held: "Manifestly no argument is necessary to show that a landing field for aircraft is a public utility. If it were not a public utility the legislature would have no power to make provision for the purchase and condemnation of lands for such purposes. It being a public utility, the question of a right to a referendum has already been settled by this court * * * ."

A further discussion of this question by another court, which decided that municipal corporations may pay for the erection, equipment, and operation of airports out of funds realized from

the sale of municipal bonds, sold for the improvement of public parks, is found in the case of *Schmoldt v. Oklahoma City*, 144 Okla. 208, 291 Pac. 119, as follows: "So the only issue for us to determine here is whether or not an aviation airport, with all necessary and proper equipment, buildings, and appurtenances thereto, is a park improvement, and may be paid for out of funds derived from the sale of bonds issued and sold for the purpose of public park improvement. In other words, is the using of a portion of the funds derived from the sale of bonds voted to provide funds for acquiring, owning, maintaining, and beautifying real property for public park purposes, an inconsistent use of the property for public park purposes? It is a matter of public knowledge that the erection of museums, art galleries, zoological and botanical gardens, conservatories, auditoriums, veterans' memorial halls, tennis courts, swimming pools, and the like in public parks, is common, and that their establishment has not been regarded as a diversion from legitimate park uses, but, on the contrary, such buildings have been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit. *Slavich v. Hamilton*, 201 Cal. 299, 257 Pac. 60; *State ex rel. Minner v. Dodge City*, 123 Kans. 316, 255 Pac. 387, and cases there cited. It appears to us that the public would receive much more pleasure, recreation, amusement, and benefit by being permitted to attend a musicale or other educational program rendered by radio or otherwise, in a conservatory or veterans' hall, in a public park, where those who are not financially able to patronize a playhouse, where an admission fee is charged, and that the public would enjoy an airplane exhibition to see an airplane glide gently to the earth and take to the air again as gracefully as an eagle in its flight, and ponder over the wonderful accomplishments of the airplane, which appears to be yet in its infancy, than they would strolling through a zoological garden viewing the reptiles, fowls, and animals. * * * The issue here presented was very recently passed upon by the Supreme Court of the State of Nebraska in *State ex rel. City of Lincoln v. Johnson*, State Auditor, 117 Nebr. 301, 220 N. W. 273, where it was held that: 'An equipped municipal aviation field is both a "public service property" and a "public utility" within the meaning of the Lincoln Home Rule Charter and the establishment of such a field is a governmental purpose for which bonds may be voted and taxes levied and collected.' Also, the Supreme Court of the State of Kansas in *City of Wichita v. Clapp et al.*,

125 Kans. 100, 263 Pac. 12, 63 A. L. R. 478, held: "The devotion of a reasonable portion of a public park to airport (aviation field), for recreation and other attendant purposes, comes within the proper and legitimate uses for which public parks are created.' Under the authorities from our sister states passing upon this question, it seems to be settled by the courts of last resort, in the states that have passed upon this proposition, that a city may use a portion of its park as an airport or aviation field. * * * The only question for us to determine is whether or not the city of Oklahoma City has a right to use any portion of the funds, derived from the sale of the bonds voted to purchase or maintain a park, in constructing a landing field for airplanes, and as said before, if a city may use a portion of such funds for building sidewalks around, walks and driveways through, its park for the amusement of the public, we see no good reason for holding the city can not expend a part of its funds in maintaining an airport for the pleasure and amusement of the public."

Probably the most comprehensive and important, as well as one of the earliest decisions on this subject, was handed down by the Supreme Court of Kansas. In construing legislative enactments providing for the acquisition and maintenance of city parks, this court held that the board of park commissioners of the city of Wichita had the authority to acquire sufficient land in connection with their park department for the establishment and operation of airways and an airport, in order that the city might enjoy the facilities of air transportation, and have the business opportunities connected therewith, to the same extent and for the same reason that municipal corporations may furnish harbors and wharves for navigation purposes. This court recognized the extreme importance of permitting its cities to keep abreast of the times in providing their inhabitants with all the benefits of aviation as a matter of transportation as well as a matter of production of aircraft equipment. In the course of its decision the court indicated that the city of Wichita had a number of factories engaged in the manufacture of airplanes and their equipment, which it was within the province of the city to support and maintain for the sake of the business advantages obtained for itself as well as its inhabitants. These considerations in connection with the location of the city itself, it being in line with the main arteries of transportation running north and south as well as from coast to coast, are the reasons for the decision of this early case, which has since be-

come a leading one on the subject, as found in *Wichita v. Clapp*, 125 Kans. 100, 263 Pac. 12, 63 A. L. R. 478, where the court said: "The specific question for consideration is whether park purposes may include an airport or landing field for airplanes. * * * The last few years have witnessed a remarkable development of aviation in all lines. * * * The airway is essentially a free highway. As such it is open to all qualified aircraft. It is rightly, therefore, a federal undertaking to lay out and equip airways. The maintenance of airports, however, comes legitimately within the scope of the municipality in much the same manner as docks and harbor facilities for marine shipping. Airports are said to be as important to commerce as our terminals to railroads or harbors to navigation. * * * The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce. * * * It is said that there were 3800 landing fields in the United States at the close of 1926 of which 400 were municipal. See 1927 Aircraft Year Book, P. 101 et seq. In a dozen cities in the far west (California, Oregon, etc.) projects for new airports or improvements of existing facilities are under way at an estimated cost of more than \$8,000,000. American City, July, 1927. In these rapidly changing times, even a wise man can not discern the needs of the future. All signs indicate that in another 25 years airports may be needed for tourists as much as tourist camps are at this time needed for those on recreation and pleasure bent. Perhaps it may not be a 'great way' into what ordinarily would be termed the 'far distant future' when the human race will be flying with wings similar to those described by Bulwer Lytton in 'The Coming Race.' In any event, we are of the opinion that the airport or landing field is as properly included within park purposes as tourist camps and other named recreational objects, and that the board of park commissioners of Wichita is authorized and empowered under the provisions of chapter 117 of the Laws of 1927, to proceed to purchase or condemn the lands in question for the purposes stated. * * * Various state legislatures, including our own, have recognized the airport as a proper municipal enterprise. * * * By an act of the General Assembly of Georgia of 1927 (Laws 1927, p. 779; Atlanta Charter Amendments, No. 360, section 4 et seq.) the city of Atlanta was authorized and empowered to purchase, own, and operate municipal landing fields * * * . By an Act of 1922 (Chapter 534, section 57, amending chapter 90, Gen. Laws 1921)

the legislature of Massachusetts empowered cities or towns to designate landing places and to make reasonable rules and regulations concerning the use thereof. The legislature of Montana, by an act passed in 1927, empowered cities and towns to acquire by gift, purchase or by condemnation, lands for landing fields within or without their corporate limits and to exercise jurisdiction over such lands. Chapter 20, Laws 1927. The general code of Ohio, par. 15 of section 3677, authorizes municipal corporations to establish landing fields either within or without their corporate limits. By Act No. 328 of the Session Laws of 1925 Pennsylvania authorized and empowered cities of the first class to acquire by lease, purchase, or condemnation lands within or without their corporate limits for the purpose of establishing and maintaining municipal airdromes or aviation landing fields."

In construing the provisions of the charter of the city of Lincoln providing for the home rule of such city, "to acquire, maintain and operate public service property," the court of Nebraska sustained the power of such city under its charter provisions to acquire and equip an aviation field in or near its limits for the purpose of making available aviation service for passengers and in the transportation of mail and freight, which this court held to be a public purpose for which funds could be raised by taxation, in the case of *State v. Johnson*, 117 Nebr. 301, 220 N. W. 273, as follows: "This is an original application for mandamus to compel the auditor of public accounts to register and certify municipal bonds in the sum of \$100,000 issued by the city of Lincoln for the purpose of establishing and equipping an aviation field for aerial traffic. The proposition to authorize the bonds was submitted to the voters of the city at a state-wide primary April 10, 1928—a general election within the meaning of the 'Home Rule Charter.' * * * The city contends that the statute cited does not control the city of Lincoln, which is governed by a Home Rule Charter containing provisions for the voting and issuing of municipal bonds for 'public service property' and for 'public utilities' upon a majority vote of the electors. Lincoln Home Rule Charter, art. 2, section 1; article 8, section 11. * * * The auditor refused to approve the bonds on the further ground that an equipped aviation field is not a 'public service property' or a 'public utility' within the meaning of the Home Rule Charter, an 'aviation field' not being specifically enumerated in the provisions authorizing the voting and the issuing of municipal bonds. This posi-

tion seems also to be untenable. The city of Lincoln has power —“to acquire, maintain and operate public service property, and to redeem such property from prior encumbrance in order to protect or preserve the interest of the city therein and to exercise such other and further powers as may be necessary or incident to the powers conferred upon such city.” Lincoln Home Rule Charter, art. 2, section 7. As already stated, another provision authorizes municipal bonds for ‘public utilities’ upon a majority vote of the electors. In a sense the Home Rule Charter is the constitution of the city. It is a frame of municipal government and is intended to be more permanent in its nature than an ordinary statute. In general features it is in a form to meet changing conditions as they arise. An equipped aviation field in or near the city is a means of making aerial service available to passengers. The service includes the transportation of mail and freight. The field is furnished for a public purpose for which taxes may be imposed in the exercise of governmental power. In this view of the question raised by the auditor, an equipped municipal aviation field is both a ‘public service property’ and a ‘public utility’ within the meaning of the Home Rule Charter which authorizes municipal bonds upon a majority vote.”

Anticipating the establishment of airplane service the court of Virginia, in discussing transportation by motor vehicles and other common carriers, indicated that it would be obliged to include transportation by airplanes in the event the public demanded this additional means for their transportation as a further necessary public convenience, although this would create an additional competitive method of transportation. This dictum is found in the decision of the case of Petersburg, Hopewell & City Point R. Co. v. Commonwealth, 152 Va. 193, 146 S. E. 292, P. U. R. 1929C, 235, where the court said: “Should the time come when airplanes are preferred by a substantial part of the public, this preference, in its turn, will have to be heeded. They, too, will have then become a necessary public convenience, not to be put aside because busses can carry all who wish to go.”

In construing municipal ordinances providing for the construction and operation of airports by municipal corporations at the expense of their taxpayers for the reason that they are public enterprises for the general use and benefit of the public at large, the courts have been universally liberal in their construction of municipal purposes as defined in these municipal

ordinances. In recognition of the rapid growth of aviation and its probable comprehensive use in the future, the courts have been prompt to recognize the popular demand and have freely extended the sphere of municipal activities to include airports and airways for use in connection with aviation, as is clearly and forcibly expressed in the case of *McClintock v. Roseburg*, 127 Ore. 698, 273 Pac. 331, where the court said: "The only part of the proceedings challenged is the right of the city to construct and maintain an airport at the expense of the taxpayers. * * * We think the statute is very clear and plainly authorizes municipalities to maintain and own airports. The reading of the statute is as follows: Section 7091, 'Any incorporated city or town of this state shall have the right to appropriate any private real property, * * * for the general use and benefit of the people of said city or town, including real property, for an aviation field or park.' (1925 Gen. L. 162, C. 106) * * * We can not close our eyes to the great growth in the use of flying machines during the past decade. This growth has been especially noticeable during the last two or three years. We must take notice that a large quantity of mail is being daily transported into the various parts of the country. Expressage and even freight is being transported by plane in large and rapidly increasing quantities. Transportation by air appears to be increasing so rapidly that we may confidently expect that soon a large portion of the mail and express will be transported by airplane. An airport owned by the city open to the use of all airplanes is for the benefit of the city as a community, and not any particular individuals therein. It is, therefore, a public enterprise. Airplanes travel the 'trackless air.' The only way an airplane company could acquire a monopoly would be through monopolizing the airport. It would seem, therefore, that airports may be properly owned and controlled by the municipality or other public corporations. Such has been the holding of all the courts passing upon the question directly."

In recognizing that airports are properly regarded as municipal purposes and that cities may maintain them in keeping abreast of the times and for the purpose of increasing their population and prosperity, the court in the case of *Wentz v. Philadelphia (Pa.)*, 151 Atl. 883, said: "The parcels purchased were to be conveyed for airport purposes, in the development of which the government was deeply interested, and therefore fixed a consideration much less than the actual market value of

the land involved. The proposed transfer to the grantee 'in trust' was evidently intended to designate the use to which the property should be devoted and not to indicate that the city was to become owner of the land as a technical trustee. Such character of acquisition was permissible, for the municipality was not limited to the purchase of a fee-simple title. * * *

'Aeronautical development emphasizes the vital importance of "airways," an essential element of which is the land field or airport. The terms "airways" applies to air routes for either airplanes or seaplanes. An airway is far more than a mere air line. It is a material and permanent way through the air, laid out with the precision and care that an engineer adopts in choosing the course and laying down of a railway. Whether over land or water, it is essentially on the ground. Its existence and general layout depend almost entirely upon the commercial demand. * * * Municipalities are studying local conditions and commercial organizations are pressing the importance of establishing terminal airports and of providing proper lighting for landing fields, and facilities such as hangars, garages, and repair shops. The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce.' *Wichita v. Clapp*, 125 Kans. 100, 263 Pac. 12, 14, 63 A. L. R. 478, 482. In this case, and that of *Dysart v. St. Louis* (Mo. Sup.), 11 S. W. (2d) 1045, 62 A. L. R. 762, and the notes thereto, will be found the recent decisions unanimously reaching the conclusion that the development of an airport is a public function, and discussing municipal powers in regulating and making use of the same. * * *

The act provides for airports, which have been defined in the Federal Air Commerce Act of May 20, 1926 (chapter 344, section 9, 44 Stat. 573 [49 USCA section 179]), as follows: "The term "airport" means any locality, either of water or land, which is adapted for the landing and taking off of an aircraft and which provides facilities for shelter, supply, and repair of aircraft; or a place used regularly for receiving or discharging passengers or cargo by air.' If the body of the ordinance be construed in accordance with that definition, it will be unobjectionable, for in granting the right to establish a municipal work, all of the incidental construction necessary to make it available for proper use is to be implied, but no more. * * *

In the present case, the moneys provided for are to be used for the purchase of land for an airport, as permitted by the legislature, and declared to be a public use, and it is expressly set

forth in the answer filed that the city has no intention to embark in a general rail or shipping business, but to carry on such work only as is incidental to the proper use of the airdrome. The constitutional objection can, therefore, have no weight."

The action of a municipality in appropriating funds raised by taxation for the purpose of acquiring and operating a municipal airport under proper statutory authority will be sustained by the courts, which do not hesitate to require municipal authorities to approve such action and make the necessary appropriation, for as the court said in the case of *Ardmore v. Excise Board of Carter County (Okla.)*, 8 Pac. (2d) 2: "The plaintiff contends that the appropriation asked for was for a legal purpose authorized by law, and that is denied by the defendant. By the provision of section 4507, C. O. S. 1921, as amended by chapter 11, Session Laws 1929, and section 6, article 18 of the Constitution of Oklahoma, the city of Ardmore, being a city of more than two thousand inhabitants, is authorized to engage in the business of operating an airport, and has the right and power to acquire, own, and maintain, within or without the corporate limits of such city, real estate for aviation airports. See *Ruth v. Oklahoma City et al.*, 143 Okla. 62, 287 Pac. 406. There is nothing in the charter of the city of Ardmore to the contrary. * * * From the decisions cited, we are of the opinion and hold that cities have authority to assess taxes for matters of purely local or municipal concern, and that their discretion therein is not subject to review by the excise boards so long as they are within the limitations provided by the legislature under the provisions of the Constitution. * * * It was never dreamed at that time that an attempt would be made to deprive the citizenship of a municipality of the power of local self-government in its municipal affairs, or to take away from it rights and privileges possessed before the Constitution was adopted and reserved therein. * * * In the case at bar, it appears that the plaintiff has a clear legal right to the action demanded. The estimate was authorized by law; it was for a purely local or municipal purpose; it was within the constitutional and statutory limitations; it was made by the governing body of the city of Ardmore; and it was the duty of the excise board to approve the same and to make an appropriation therefor."

Where a municipality owns and operates an airport for the purpose of deriving revenue, it is acting in its private or proprietary capacity and as the purpose is a municipal one, the

municipality may become liable for its negligence in permitting its equipment to become out of order and to injure a member of the public visiting the airport as is indicated in the case of *Mollencop v. Salem (Ore.)*, 8 Pac. (2d) 783, for as the court said: "The written contract discloses that the city was not devoting the airport exclusively to municipal or governmental uses, but had undertaken to conduct an enterprise there of a commercial character from which it sought to derive revenue. In the state of the record when plaintiff rested her case, by virtue of said contract, there was a prima facie showing that the airport was owned and operated by defendant city in its corporate or proprietary capacity. * * * There was evidence of the maintenance at the airport of the loose and sagging wire. Whether permitting such a wire to be and remain as and where it was while the public was in attendance upon the premises constituted negligence was a question to be submitted to the jury under appropriate instructions as to the law. We can not say, as a matter of law, either that it did or did not constitute negligence. * * * Applying these principles to the case at bar, we hold that where the defendant operates a municipal airport to which the public is invited, and in the maintenance of such airport defendant suffers a loose and sagging wire to remain about its premises for the general public to cross, it ought not to be declared, as a matter of law, that the defendant could not reasonably have anticipated that some one would flip or move such wire in such a manner as to cause some other person to be thrown while trying to step over it."

§ 46. **Municipal radio stations.**—In 1924 the secretary of commerce issued a license under the Radio Act of 1912 to the city of New York providing for the operation of a radio broadcasting station in that city under the call letters of WNYC. This license was renewed from time to time until 1928 when New York City was required to share equally with station WMCA which also operated in New York City, on the same frequency as the other station. In holding that the city of New York in the operation of its radio station and in broadcasting its communications was engaged in interstate commerce and therefore subject to federal regulation, the court decided that the radio commission had authority to require these stations to share equally in the time of operating their broadcasting service. By way of reply to the contention of New York City that, in the operation of its station, it was a municipal corporation exercising a governmental function and that the

federal radio commission did not have the authority to prohibit its operating on a full time schedule, the court held that, in the operation of its radio station, this city was exercising private and not governmental powers and was accordingly acting as a corporate legal individual and not as a municipal corporation so far as its regulation by the commission was concerned. This decision is rendered in the case of *New York v. Federal Radio Commission*, 36 Fed. (2d) 115, 59 App. D. C. 129, where the court said: "It is true that appellant is a municipal corporation, but in the operation of its radio station it exercises private, and not governmental, powers, and accordingly is not acting as a municipal corporation but as a corporate legal individual. *Vilas v. Manila*, 220 U. S. 345, 356, 31 Sup. Ct. 416, 55 L. ed. 491; 43 C. J. 182, 183. Moreover, even if station WNYC is partly used for governmental purposes, the use is nevertheless subject to the regulatory control exercised over the national broadcasting system which is vested by statute in the Federal Radio Commission. * * * The Commission found that under the revised allocation of stations it was impracticable to grant the application of station WNYC for full operating time without the complete elimination of station WMCA. The latter station serves the same public as the former, and has won the public esteem by the high character of its service. It is believed that the stations may without substantial prejudice severally continue their public service under the present arrangement."

CHAPTER 5

THE IMPLIED POWERS OF MUNICIPAL CORPORATIONS

Section

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§ 50. **Power to provide municipal public utilities generally implied.**—The principle of the implied powers of municipal corporations to provide themselves with municipal public utilities is generally recognized by our courts. Through their liberal recognition of the existence of implied powers more than in any other way they have given full effect to the purpose, and prac-

tical recognition to the commercial objects, for which municipal corporations are established. The field is naturally a fertile one for judicial legislation and construction, and it has been fully developed by our courts in giving effect to the powers necessary to a full enjoyment and a complete realization of the advantages of such corporations, to the end that the greatest public good might be attained. Decisions giving the most complete freedom of activity to municipalities, consistent with their best interests and not derogatory of specific statutory regulations, represent the great weight of authority. It is only a few of our courts that refuse the right of municipal corporations to keep abreast of the times and to conduct their affairs to their best advantage and for the greatest benefit of their citizens.

§ 51. **Best interests of municipality the test.**—In view of the fact that practically the sole purpose of such corporations in their capacity as business concerns is to benefit the people who inhabit them and thus constitute their stockholders, so to speak, it is submitted that the present advantage of their citizens and the prospective advancement of these organizations should be the test of the control exercised over them by the legislature and the courts. The only other party even remotely concerned is the state and its interests in such matters are identical with those of the municipality. Since the interests of the two parties involved are the same it is only reasonable to suppose that the one party, in legislating for the other, intends always to accomplish the greatest good for the greatest number concerned.

The implied power of a municipal corporation to provide telephone service for itself and its inhabitants and to fix the terms and rate for such service at least until the state attempts to regulate the matter is clearly set out in the case of *Fink v. Clarendon* (Tex. Civ. App.), 282 S. W. 912: "This franchise ordinance or franchise contract contains no provision expressly granting an exclusive right or privilege to the Clarendon Telephone & Telegraph Company; hence, if it grants such exclusive right or privilege, this must be ascertained by clear and necessary implication from the language used in the ordinance or contract. * * * The city of Clarendon, while not vested with the power to regulate by legislation—which is by enacting ordinances—the rates charged for telephone service within its corporate limits, was and is authorized to make and enter into contracts for the benefit of the city and its citizens. While the authority to make the franchise contract for local telephone service for itself and its citizens may not be given in express

words, it is fairly implied and essential to the declared purpose of modern municipalities because local telephone service is no longer a mere convenience, but it is indispensable to their social life, business communications, commercial transactions, law enforcement, fire alarms, etc. *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 24 L. ed. 708; 26 R. C. L. 478; *Jones, Telegraph & Telephone Companies* (2d ed.), par. 23. The governmental or legislative power of the appellee should not be confused with its right to contract. *Public Utilities, Pond* (3d ed.), p. 16, par. [section] 5. * * *. Appellee, not having been delegated any governmental or legislative power to regulate telephone rates by ordinance, must, in so far as it asserts any rights based on the franchise contract, depend on its authority to contract for the benefit and protection of itself and its citizens. A municipality can not barter away or abrogate by contract the police power delegated to it; neither can it abolish the inherent power lodged in the state to regulate rates charged by public service corporations. * * *. Under these constitutional reservations, no contract could be made by the city that would not be 'subject to the control' of the legislature, and no rates fixed that would not be 'subject to amendment, modification or repeal' by the legislature. This franchise contract does not barter away any police power of appellee, for the very good reason that the power to regulate telephone rates by legislation has never been delegated to cities like Clarendon, with less than 5,000 inhabitants, and, hence, appellee could not deprive itself by contract of some power it never possessed. *Texarkana Gas & Electric Co. v. City of Texarkana*, 123 S. W. 213, 58 Tex. Civ. App. 109. * * *. The legislature of the state has not enacted any statute controlling the rates charged for local telephone service, nor created any commission with authority to regulate such rates, nor delegated such power to such cities as Clarendon; and the contract between appellee and appellant is subject to the power of the state to change the rates expressed in the contract, if necessary for the public welfare; but until the state, by its legislature, regulates or delegates the power to some other authority to regulate the rates for local telephone service, the franchise contract is valid as between the parties, because it must be held that they contracted with reference to the right of the state to exercise its innate authority to control, amend, modify, or repeal."

§ 52. Only general powers expressly given by statute.—Because of the many details in administration and the varying

circumstances and changing conditions of the different cities, only general legislation with reference to them is advisable or possible. This necessitates the exercise of much judgment and of many implied powers by the cities, in whose officers must be vested a wide discretion. And in construing such general statutes in a particular case regard must be had for the facts and circumstances of the case in hand so that the general law as applied will give the best results. It is in determining the legislative intent and in giving such intention the most favorable practical application to the particular city of which it will admit, that the courts take the opportunity to advance the interests by extending the scope of the activity of such municipality as its welfare requires. And it is submitted that for these practical reasons the authorities with very few exceptions favor a decided increase of the sphere of municipal activity because the best interests of these corporations demand it.

§ 53. Statutory power to provide municipal public utilities constitutional.—In addition to the powers found in municipal corporations under the construction of the term “municipal purpose,” as used in our constitutions, to own and operate or provide themselves with municipal public utilities, which have already been discussed, statutes expressly providing that municipalities may furnish such public utilities as electric light, water and gas for the private use of their citizens and themselves are universally upheld by all our courts as constitutional.¹

While municipalities may acquire waterworks and an electric light plant under proper statutory authority, the provisions of the statute giving such authority must be complied with before the municipalities can acquire such plants, as is indicated in the case of *Indiana Service Corp. v. Warren* (Ind. App.), 180 N. E. 14, where the court said: “The undisputed evidence discloses

¹ Federal. *Fellows v. Walker*, 39 Fed. 651; *Andrews v. National Foundry & Works*, 61 Fed. 782. Connecticut. *Norwich Gas & Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746.

Florida. *State v. Pinellas County Power Co.*, 87 Fla. 273, 100 So. 504.

Massachusetts. In re Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *Citizens Gas-light Co. v. Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.

Michigan. *Mitchell v. Negaunee*,

113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. 468.

Mississippi. *Love v. Holmes*, 91 Miss. 535, 44 So. 835.

Ohio. *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; *Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63.

Pennsylvania. Appeal of *Lehigh Water Co.*, 102 Pa. 515, affd. in 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Linn v. Chambersburg*, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217.

that the appellee town of Warren did not, prior to the execution of the contract involved, adopt any resolution declaring the necessity for entering upon the policy of purchasing a generating unit in order that it might acquire electric light works and waterworks, nor was the question submitted to the qualified voters of the town at any special or general election upon notice by publication, or otherwise; such evidence further shows that no notice was given and no election held. * * * The board of trustees of said town reached the conclusion that the better business policy was for the town to own its own generating unit and acquire its own electric light works and waterworks, and the contract in controversy was executed. * * * We hold that the foregoing statute grants the power and provides the method to be followed in the instant case, in order to accomplish the result sought. It can not be said that this contract amounts to an agreement only to purchase merchandise and machinery for an existing plant, and that the equipment purchased and to be installed should be considered in the class of repairs or replacement. The unquestioned evidence shows that the board of trustees of the town intended to purchase and install new and different equipment constituting a complete generating unit, differing in design and character from any previously used and sufficient to furnish all needed electric energy and power to give it complete electric light works and waterworks plants."

§ 54. **Electric light plants.**²—In the case of *Linn v. Chambersburg*, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217, decided in 1894, the court said: "The power of the legislature to authorize municipal corporations to supply gas and water for municipal purposes, and for the use and benefit of such of their inhabitants as wish to use them and are willing to pay therefor at reasonable rates, has never been seriously questioned. In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied? It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age."

The power of the city to purchase electrical energy for its electric light plant rather than to generate it itself is a further

² This section of third edition N. Car. 740, 150 S. E. 624, P. U. R. cited in *Holmes v. Fayetteville*, 197 1930A, 369.

extension of the sphere of municipal activity as was established by the court in *Moomaw v. Sions*, 96 Okla. 202, 220 Pac. 865: "The authority given the municipality to undertake the operation of a business enterprise necessarily carries with it the authority to deal with the same in the same manner that a private corporation would deal with its property, subject only to constitutional and legislative restrictions. In the instant case it is not necessary to pass upon the question of the right of the city to entirely abandon the operation of its light system or to make a sale thereof, as the contract in this case attempts to do neither. The particular effect of the contract under consideration is to provide for the purchase of electric current to be used by the city in maintaining its electric light system instead of generating electricity at its own plant. This was a question for the board of trustees to determine in the exercise of the best business judgment of the members of such board in the operation of the quasi-private enterprise, and the contract executed for that purpose was valid unless entered into through caprice, fraud, or oppression."

§ 55. **Steam railroad the exception.**—The case of *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24, decided in 1871, in sustaining as constitutional and upholding in all respects a statute expressly giving authority to a certain class of municipal corporations, including the city of Cincinnati, to own and operate a railroad, furnishes a striking and unusual illustration of the extent of the powers of municipalities when expressly conferred by statute. Acting under such authority the city of Cincinnati was permitted to build, maintain and operate a steam railway known as the Cincinnati Southern Railway, which extended for many miles out of the city of Cincinnati.

The case is unique, however, in sustaining the power of the municipal corporation to own, maintain and operate a steam railway extending for many miles beyond the city in question; and while the case has failed to receive the approval of other decisions referring to it, the case of *Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63, decided in 1900, indicates that the decision remains the law of that case although the courts have refused to extend its application or to follow it in other similar proposed undertakings.

§ 56. **Three grounds for doctrine of implied powers.**—Under the doctrine of the implied powers of municipal corporations the decisions extending their sphere of activity are based on one of

three grounds. The first which is probably the most frequently invoked is that of the police power, whose application in this connection, as well as in others, is an excellent illustration of the pertinent remark by one of our courts that, "it may be said that it is known when and where it [the police power] begins, but not when and where it terminates."³

Another basis for these decisions which has been frequently given is that of the general welfare clause found in many city charters. This is often mentioned in connection with the third reason with which it is closely allied—that the purpose is public or municipal.

§ 57. Police power—General welfare—Municipal purpose.—All three of these are sound reasons for the decisions of our courts, recognizing in municipal corporations additional powers to those expressly granted on the theory that they are entitled to exercise powers "necessarily or fairly implied in or incident to powers expressly granted, or those essential to the declared objects and purposes of the corporation." It may seem that the police power is the least germane and definite because of its elasticity and of the very wide application which it is given as the reason for some decisions upon almost all subjects. It is, however, a valid basis for these decisions, for the furnishing of water, light, gas, and such public utilities to the individual inhabitants of cities concerns the protection of their health, life and property, which constitutes a duty of the municipality to its citizens. But naturally the general-welfare clause of the charter or the fact that the purpose is a necessary or municipal one furnishes a basis for this line of decisions that is more peculiarly applicable than that of the police power.⁴

§ 58. Increase of sphere of municipal activity.—Further, the power of the municipality to provide these public utilities for the private use of its citizens is implied from the power to furnish such utilities for use upon its streets and in other public places, in the absence of any express legislative authority, by most of our courts. There are a few decisions it is true which refuse the city the right so to extend its sphere of activity and usefulness for the advantage of its citizens. The great weight of authority, however, and certainly the better reason

³ *Champer v. Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. 390.

⁴ *Dillon Mun. Corp.* (5th ed.), §§ 1293 et seq. and cases cited.

permits this extension of power and favors an increase of the sphere of municipal activity.

§ 59. **Power and duty to provide municipal public utilities.**—The rule of law is well established to the effect that a city, in erecting gas, water or electric light plants, is not limited to providing the service of such utilities for use only upon the streets and in other public places of the city, but that it may in connection therewith furnish the same for the private use of its citizens. Some of our courts have even held that it is the duty of the municipality not only to light its streets and public places, but to furnish its inhabitants with the means of obtaining light at their own expense.⁵

In the case of *Covington Gaslight Co. v. Covington*, 22 Ky. L. 796, 58 S. W. 805, decided in 1900, the court said: "It seems to us that, under these provisions in appellee's charter, it was not only its right, but it was its plain duty, to provide for the lighting of the streets, public places, and buildings, and to furnish light to the citizens of the community in the best, cheapest and most approved manner."

The duty of the municipal corporation to furnish the conveniences of municipal public utilities is expressed by the court in the case of *Springville v. Fullmer*, 7 Utah 450, 27 Pac. 577, decided in 1891, as follows: "And having the power it was the duty of the plaintiff to use it so far as the health, safety, convenience and good of its inhabitants demanded."

That the tendency of the courts is toward an increase of the sphere of municipal activity in this connection is indicated in the case of *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519: "The great weight of authority is to the effect that an express grant of power to light streets, carries by necessary implication power to construct or acquire by purchase a lighting plant for that purpose. *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388; *Mauldin v. Greenville*, 33 S. Car. 1, 11 S. E. 434, 8 L. R. A. 291; *Ellinwood v. City of Reedsburg*, 91 Wis. 131, 64 N. W. 885, and cases cited below. In respect to the right of a city to construct, purchase, or maintain such a plant for supplying electric current to private consumers there is a lack of harmony in the reported cases; but we believe that the trend of the later

⁵ *Andrews v. National Foundry &c. Works*, 61 Fed. 782; *Newport v. Newport Light Co.*, 84 Ky. 166, 8 Ky. L. 22; *Covington Gaslight Co. v. Covington*, 22 Ky. L. 796, 58 S. W. 805; *Springville v. Fullmer*, 7 Utah 450, 27 Pac. 577.

cases is in favor of power to that end in municipal corporations; and, in our opinion, the current of authority to that effect must increase, reason and the spirit of the age alike demanding it."

In view of some diversity of opinion of the courts and the recent date of the decisions which make it impossible to speak of the doctrine defining the limits of this principle as finally accepted by all our courts, it has been thought best to set out somewhat at length some of the decisions together with the grounds upon which they are based to show the authority for the position taken by our courts favoring an increase of the sphere of municipal activity.⁶

§ 60. **Electric light plants by virtue of police power.**—The case of *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 38 Am. St. 214, decided in 1891, is a leading one and has been frequently cited with approval. The court stated the question for decision as follows: "Has a municipal corporation in this state the power to erect, maintain, and operate the necessary buildings, machinery and appliances to light its streets, alleys and other public places with the electric light, and at the same time and in connection therewith to supply electricity to its inhabitants for the lighting of their residences and places of business?" The only statutory authority in point provided: "That the common council of any city in this state incorporated either under the general act for the incorporation of cities or under a special charter, and the board of trustees of all incorporated towns of this state, shall have the power to light the streets, alleys, and other public places of such city and town with the electric light, or other form of light, and to contract with any individual or corporation for lighting such streets, alleys, and other public places with the

⁶ California. *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. 191; *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915A, 754; *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668.

Georgia. *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199.

Indiana. *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. 214; *Logansport v. Pub-*

lic Service Comm. (Ind.), 177 N. E. 249.

Kentucky. *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433.

Maine. *Laughlin v. Portland*, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734.

Washington. *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

Wisconsin. *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885; *Eau Claire Water Co. v. Eau Claire*, 127 Wis. 154, 106 N. W. 679, 112 N. W. 458.

electric light, or other forms of light, on such terms, and for such time, not exceeding ten years as may be agreed upon." In holding that the city might furnish electricity to its inhabitants the court said: "Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life and property. * * * The corporation possessing, as it does, the power to generate and distribute through its limits, electricity for the lighting of its streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to the inhabitants to light their residences and places of business. To do so, is in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here again is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property, and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health." The court reached its decision notwithstanding the existence of a provision in the statutes authorizing the grant to any corporation of the right to erect and maintain in the streets the necessary poles and appliances for the purpose of supplying the electric or other light to the inhabitants.

This decision is the leading one on the subject that is expressly put on the ground of the police power, and the reasoning of the court in doing so has met with approval by all the decisions which accept the doctrine of implied powers in this connection. The argument of the court is convincing, and although somewhat ingenious and novel when made, is now well recognized and has been advanced in later cases following this decision. It will also be noted that these cases are concerned with electric lighting which is not so essentially a matter of public health as the furnishing of a water supply or a sewerage system, and which is of course a more modern public utility.

The leading case of *Crawfordsville v. Braden*, supra, is discussed and sustained as follows by the Supreme Court of Indiana in the current case of *Logansport v. Public Service Commis-*

⁷ Acts of Indiana, 1883, p. 85. See §§ 11129-11137, and Supp. 1929, also, Burns' Ind. Rev. Stat. 1926, § 11134.

sion (Ind.), 177 N. E. 249, 76 A. L. R. 838, P. U. R. 1931E, 179: "The power of a city to operate an electric light plant to light the streets for purposes of safety, security, and public convenience, like the power to operate a water plant to obtain adequate fire protection or water for the health and sanitation of a city, may well be included in the implied powers indispensable to the declared objects and delegated powers of a municipal corporation, and in *Crawfordsville v. Braden* (1891), 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214, it was held that a city had implied or inherent power not only to light its streets and to establish works to produce the electric current for that purpose, but also in connection therewith to furnish its inhabitants with light in their homes and places of business."

§ 61. Sewer and water systems—Irrigation districts.—The police power serves as a more natural support to the decision of the case of *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. 191, where the action was to recover the contract price for services rendered in disposing of sewerage for the defendant city. The court said in the course of its decision that, "proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether, by possibility, the power had been expressly denied."

Where the legality of an irrigation district is not questioned and the proceeds of a bond issue are used for this purpose, of which the plaintiff had notice at the time as required by statute, but remained silent for a number of years without objection, the question of the invalidity of the bonds because they may have been issued without a proper petition, and that the validity of such an issue may be properly validated by statute without violating any constitutional provision, without objection by property owners benefited by the improvement to the payment of taxes for the improvement, especially when no objection is made at the time the improvement is being made, is decided in the case of *Judith Basin Land Co. v. Fergus County, Montana*, 50 Fed. (2d) 792, where the court said: "The legality of the irrigation district is not challenged. The proceeds of the bonds were devoted to the public purpose designated. The plaintiff had notice of the confirmation hearing provided by statute, of the progress of the work of development, and full opportunity, if illegal, to prevent its accomplishment. Inasmuch as it was silent for more than nine years and failed to speak when it

should have spoken, the arm of the chancellor may justly be reluctant to move. * * * And it is not enough to say that the bonds were invalid because issued at a place not authorized, or in the absence of a proper petition. The purpose of the statutes was to validate invalid bonds. Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. ed. 414. The bonds were issued for a proper municipal purpose, and the proceeds were properly applied to the purpose. Irregularity in issuance and excess of, or departure from, statutory authority by administrative or executive officers, are matters within the province of the legislature to remedy. * * * In the instant case there is no state constitutional limitation withholding legislative power of any of the acts complained of. The legislature could, in the first instance, have authorized the issuance of the bonds without a petition of the landowners and the sale thereof at the price obtained, or established the office of the district at the place where located, or elsewhere outside of the district. * * * Nor is a state statute validating municipal bonds inhibited by the federal Constitution. [Citing cases and quoting statutes of Montana.] These are the validating statutes which have been attacked. A more specific and all inclusive ratification can scarcely be conceived. * * * Federal courts for many years have expressed concurrence in the general current of opinion upon state statutes in the state court. * * * While taxes are assessed for the common good, special assessments are for benefits to land equal to the assessment in a district common to all. The value of the land in the irrigation district and the bond issues and assessment and benefits must be considered as of the time when authorized and made. Appellant may not speculate upon public benefits; and, having stood by and taken advantage thereof for ten years and permitted assessments and taxes to become delinquent, because of accumulated taxes, assessments, and interest upon the bonded indebtedness, it can not claim that 'now' the assessments are out of proportion to the value of its land. The assessment must be itself illegal when made. The scheme of assessment and the equalities which are provided are the determining factors. * * * No claim of unequal assessment is made. There is no claim that the special assessment when made was not equal in amount and benefit received."

That the water improvement district may raise funds by taxation for the purchase and extension of an existing waterworks system which is held to be a public utility and that improved

property in such district may not object because unimproved property would not be benefited is the effect of the decision in the case of *Middleton v. Police Jury*, 169 La. 458, 125 So. 447, for as the court said: "It is admitted that the bond issue proposed will take care of thirty-five per cent of the area to be taxed, and that this includes all of the developed and improved area of the district; that the district comprises about 30,000 acres. It is shown that the plaintiffs own lots and improvements in the developed part of the district, and do not own any of the vacant or unimproved lands. They are, therefore, without interest to urge that the vacant lands will receive no benefit. Each of the plaintiffs will share in whatever benefits any of the citizens of the district receive from the inauguration of a system of waterworks. The complaint that the act is unconstitutional, because it conferred upon the district authority to purchase or expropriate an already existent waterworks system is without merit. If the legislature had the authority to create the district, as we have held, it had the authority to authorize said district to purchase, as well as to construct a waterworks system. * * *

As outsiders, the plaintiffs, therefore, have no reason or interest to complain, if the citizens of Kenner are willing to surrender their inadequate and imperfect system of waterworks for a more perfect and complete system, to be established by the district as created."

In sustaining the power of water supply districts to raise funds by the levy of taxes to provide a water system for domestic and commercial purposes, the court in the case of *Matlock v. Dallas County Arcadia Fresh Water Sup. Dist.*, 118 Tex. Com. App. 120, 12 S. W. (2d) 181, said: "Those cases are full authority for us to say that the levy of taxes sued for by the appellee became valid under the validating act of the Fortieth Legislature on it being shown that the requirements contained in said section 3 have been complied with. As to 'Question No. 2,' above certified we think that this question has been fully decided and settled by our Supreme Court in the case of *State ex rel. Merriam et al. v. Ball et al.*, 116 Tex. 527, 296 S. W. 1085. In that case, our Supreme Court, speaking through Chief Justice Cureton, says: "This act in effect provides for the organization of local improvement districts, for the conservation, transportation and distribution of fresh water from lakes, pools, reservoirs, wells, springs, creeks, and rivers, for domestic and commercial purposes, as contemplated by sec. 59, art. 16, of the Constitution of the state.' By the language employed our Su-

preme Court has certainly expressly held that the act in question is contemplated by section 59 of article 16 of the Constitution, and, if the act is in contemplation of the Constitution, it is certainly authorized by the Constitution. We therefore recommend that both questions certified be answered in the affirmative."

That, under statutory authority to create water improvement districts, the district may levy the necessary taxes for doing so upon all real and personal property, including that of a railroad company, because the establishment of such a project would increase the value of all property in the vicinity is the effect of the decision in the case of *Western Union Tel. Co. v. Wichita County Water Imp. Dist.*, No. 1 (Tex. Civ. App.), 19 S. W. (2d) 186, where the court said: "The statutes giving to the commissioners' court the power to create water improvement districts authorize the districts so created to levy and collect an ad valorem tax within constitutional limits within such district upon all real and personal property, and Judge McClendon, in the *Ward Irrigation District Case*, and Judge Cobbs, in the *Hester Case* (in which last case writ of error was denied by the Supreme Court), each recognizes the public benefits and the benefits to the lands situated in the district and incidentally to the personal property in the district. * * * The fact that the railroad company may use it and may be able to use it only for railroad purposes, we think, is not material to the inquiry. Railroad property, whether right of way or of other character, is not dedicated to a public use in the sense that it is exempt from taxation and for taxation purposes is treated as the property of a private individual. * * * There can be no question that the irrigation project of the defendant in error has increased the value of plaintiff in error's right-of-way, telegraph poles and lines, and its other personal property by increasing its business and enhancing the value of its right-of-way—even though it has been agreed that such right-of-way is 'personalty.'"

This same court, in sustaining the power of an irrigation district to raise funds by taxation for the purpose of providing an irrigation system under proper statutory authority, because it is for the public benefit and is to be regarded as a public utility, which the state may provide for and regulate under its police power, held that all lands within the district, unless excluded when the district is formed, must be served without discrimination as to service and the charges therefor. This well-established principle, together with the reason on which it is founded,

is well expressed in the case of *Arneson v. Shary* (Tex.), 32 S. W. (2d) 907, as follows: "Originally appellants had the right to have their lands excluded from the boundaries of Hidalgo county water control and improvement district No. 7, but, failing to do so at the proper time, they lost their right under the law. * * * This is a power of which the legislature can not by any contract divest itself, even if it should undertake to do so, and much less could a contract, between individuals and a private corporation, destroy. The matter of irrigation of the arid and semiarid lands of the state of Texas is a question of vital economic importance to the welfare of the state, and its irrigation is a public benefit and a public utility that inures to the advantages of the state and is therefore necessarily under the control and regulation of the state government through its legislature and its duly constituted agencies of government. If this right be regarded, as stated, a police power, no statute or decision of our courts has aptly defined it; it is so far-reaching that it can not be stopped or measured except by the restriction of its powers by express legislation or stipulation. We believe it is within the terms of police power, and expressly controlled by the state and its constituted agencies of government. * * * As appellants' lands have been and are furnished water, no mandatory injunction should lie to compel the same. The law requires all lands within the district to be served with water under the same rules and regulations and for the same charges. The proposed Hidalgo county water control and improvement district No. 7, would be reasonable and practical and be a benefit to the lands to be included therein, and be a public benefit and utility."

Where the lands, however, are no longer a part of the water improvement district because the district had been abandoned, this court properly held that the board had no further authority to levy taxes on such lands in the case of *LaSalle County Water Imp. Dist. v. Guinn* (Tex. Civ. App.), 40 S. W. (2d) 892: "There is no authority resting in the board of directors to levy a tax on lands no longer a part of the water improvement district. * * * The original district has been abandoned, and we know of no way to disentangle its dissolution and again make it a going concern. Whether legally or illegally, it has been destroyed; and whether its 'taking off' was done according to law or not, it is gone. Appellees are not authorized, save and except through a writ of quo warranto, to attack the legality and vitality of the 85,000-acre district."

That the disposal of sewerage is a proper exercise of the police power of municipal corporations in the interest of the public health, which can not be surrendered, is the effect of the decision in the case of *State v. Curtis*, 319 Mo. 316, 4 S. W. (2d) 467, where the court said: "Proper disposition of sewage is essential to public health, and the passage of laws making such possible is obviously a proper exercise of the police power. * * * This power resides in the people of the state. * * * It may be exercised through municipalities and other agencies (28 Cyc. 693), but can never be surrendered or bargained away. * * * Although a drainage or sewer district be formed by an agency designated by the General Assembly, and it functions as such, yet the General Assembly in the exercise of the police power may authorize the inclusion of the same territory in another district for the purpose of furthering like improvement through the same or a different agency. * * * The provisions of the act in this respect are identical with those of the Drainage Act, and we have several times held that bonds issued in benefit districts against special assessments are not indebtedness within the meaning of section 12, art. 10, of the state Constitution."

That in connection with its water supply and drainage system a municipality may own land for park purposes beyond its city limits for the benefit of its inhabitants in the neighborhood is established in the case of *Smith v. Kuttawa*, 222 Ky. 569, 1 S. W. (2d) 979, where the court indicated that: "We see no good reason why a city may not acquire or own property beyond its corporate limits for legitimate city purposes. The necessities of an adequate and pure source of water supply, of a remote situation of pesthouses, of large tracts of land for park purposes acquired when land can be acquired in a large tract and before the city has built up to, around, and upon it, of suitable places for incinerators and garbage disposal, of farms for the penal and charitable institutions, of hospitals for tubercular patients and homes for incurables—all dictate the reasonableness of the rule allowing a city to own property for such purposes beyond the corporate limits. * * * We are of the opinion that the town of Kuttawa, since it was not expressly denied such capacity, had the capacity to acquire and own the easements and rights granted to it by Governor Anderson by his deed of 1880. * * * To effect a forfeiture for breach of a condition subsequent, there must be some affirmative positive act manifesting the intention of the grantor to that end. To

effect such a forfeiture, a re-entry or some act which may be a lawful substitute therefor is ordinarily required. * * * The record here shows that the citizens of Kuttawa have from the date of the deed in 1880 to the present time enjoyed without interruption, and without objection on the part of Governor Anderson or his estate, the rights granted them by the deed of 1880. There has never been any reclamation of those rights for any condition broken. It therefore follows that the town has never been divested of its rights under the 1880 deed by any alleged failure on its part to maintain the dam. * * * Taking them together, we find a clear disclaimer of any intention to dedicate Lake Clough as a public park and no further than as a park for the benefit of the owners of the suburbs."

§ 62. **Waterworks and electric lighting.**—In *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885, the court said: "It is not necessary to seek for an express delegation of power to the city to build a waterworks and electric lighting plant in order to determine whether such power exists, for the general power in respect to police regulations, the preservation of the public health, and the general welfare includes the power to use the usual means of carrying out such powers, which includes municipal water and lighting services."

The principle announced in the foregoing section applies to waterworks and electric lighting plants. The case of *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433, decided in 1907, furnishes a quaint historical statement and illustration of the power of municipal corporations to provide themselves with the conveniences of municipal public utilities and shows that such power has practically always been regarded as belonging to such corporations. In the course of its decision the court said: "Public ownership of public utilities has been a political as well as a legal question for quite a while. It seems to have been a political question long before its legality was doubted. We read that Hezekiah, king of Judea, established and maintained by public authority a city waterworks plant in the city of David. 2 Kings, c. 20, verse 20. And who has not heard of the public baths of ancient Rome? The public lighting of the streets of cities is of modern origin yet the necessity for lighting in a city is scarcely less now than its necessity for water. * * * A good light is the equivalent of a good policeman in preventing certain forms of crime. It is therefore universally held now that it is clearly within the police power of cities, even

without express authority, to provide public lighting of their streets at the public expense."

Although the municipality may have granted a franchise to private parties, unless it was exclusive, the city may itself construct and operate similar public utilities in competition with such privately owned ones, although the practice of doing so is not economically sound, because it tends to create competition among natural monopolies and results in economic waste and unnecessary duplication of maintenance and operating costs. Such is the decision in *Vernon v. Montgomery* (Tex. Civ. App.), 265 S. W. 188, where the court expressed the rules as follows: "It is insisted under the fourth ground of objection that the city did not have the right to issue bonds for the purpose of constructing the water and light plant because the undisputed evidence shows that if such plant should be constructed the city could not have the exclusive right to operate a light plant because there was an outstanding franchise and another plant in existence. This contention is not sound. Under the state Constitution, art. 1, section 26, it has been held that a city can not grant a private corporation an exclusive franchise to furnish water, light, and power or gas to the inhabitants of such city for a given number of years. *Hartford Fire Insurance Co. v. City of Houston*, 102 Tex. 317, 116 S. W. 36; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143. Even though a franchise has been granted, the city can nevertheless grant a similar franchise for the operation of a similar public utility to another corporation or can construct its own plant and operate it in competition with the company to which such a franchise has been granted. *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960. The record discloses that Vernon is a city of over 5,000 inhabitants. In virtue of the general laws it has the right to construct, own, maintain, and operate its own light and water system, and, as in this case, to issue bonds for that purpose."

In the case of *Young v. Bossier City*, 154 La. 625, 98 So. 45, the court refused the city the right to lay a system of water mains to connect with the plant of a private waterworks company from funds realized by the issuance of bonds by the city to construct, operate, and maintain its own waterworks. In the course of its decision the court said: "In the case at bar, the taxpayers did not authorize the issuance of bonds for the purpose of laying a system of pipes and connecting them with the Shreveport waterworks system. No such proposition was

even submitted to them. What they authorized was the construction of a waterworks system, as that term is ordinarily understood, with its own water supply and tank as well as the pipes that are about to be laid, all of which is to be owned by the village."

§ 63. General welfare clause of municipal charters.^a—The promptness with which our courts extended the power of municipalities to include the employment of the modern agency of electricity for private purposes, after the advantages of using it for public lighting had been demonstrated, is the best evidence that they desire to extend the sphere of usefulness of our cities whenever the opportunity is given. The courts are of the opinion that it is not only within the power of the cities but that it is their duty to keep themselves free to accept for their own use and to provide for their inhabitants new inventions and superior agencies as they arise, and that cities are not to be restricted to the providing for the strict necessities of their citizens but that they may also minister to their comfort and pleasure. The courts have not hesitated to find power by implication in the municipality to furnish its inhabitants with electric light and other such public utilities not only on the ground of the police power, as we have just seen, but for the reason that to do so is properly included in the general welfare clause commonly found in municipal charters or for the reason that the purpose is a public or municipal one, or one of necessity.^b

^a This section quoted in *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199.

^b *United States. Jones v. Portland, Maine*, 245 U. S. 217, 62 L. ed. 252, 38 Sup. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660; *Superior Water, Light & Co. v. Superior, Wisconsin*, 263 U. S. 125, 68 L. ed. 204, 44 Sup. Ct. 82; *Southern Utilities Co. v. Palatka, Florida*, 268 U. S. 232, 69 L. ed. 930, 45 Sup. Ct. 488; *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 73 L. ed. 653, 49 Sup. Ct. 282; *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. 71.

Federal. Thomson-Houston Elec. Co. v. Newton, Iowa, 42 Fed. 723; *Ashland Waterworks Co. v. Ashland, Kentucky*, 251 Fed. 492; *Central*

Power Co. v. Central City, Nebraska, 282 Fed. 998; *Sumter Gas & Co. v. Sumter, South Carolina*, 283 Fed. 931, P. U. R. 1923B, 755; *Alaska Elec. Light & Co. v. Juneau, Alaska*, 294 Fed. 864; *Tulsa, Oklahoma v. Oklahoma Nat. Gas Co.*, 4 Fed. (2d) 399; *Oshkosh, Nebraska v. Fairbanks, Morse & Co.*, 8 Fed. (2d) 329; *Schappi Bus Line v. Hammond, Indiana*, 11 Fed. (2d) 940; *Mutual Oil Co. v. Zehrung*, 11 Fed. (2d) 887; *Dayton, Ohio v. City R. Co.*, 16 Fed. (2d) 401; *Lynchburg Trac. & Co. v. Lynchburg, Virginia*, 16 Fed. (2d) 763, P. U. R. 1927B, 466; *St. Louis-San Francisco R. Co. v. Moore*, 25 Fed. (2d) 964; *Central Kentucky Nat. Gas Co. v. Mt. Sterling, Kentucky*, 32 Fed. (2d) 338, P. U. R. 1929E, 446; *Hodges v. Bluff City, Tennessee*, 32 Fed. (2d) 779; *New*

York, New York v. Federal Radio Comm., 36 Fed. (2d) 115, 59 App. D. C. 129; Kentucky Power & Co. v. Maysville, Kentucky, 36 Fed. (2d) 816, P. U. R. 1930B, 505; West Texas Utility Co. v. Spur, Texas, 38 Fed. (2d) 466; Louisville, Kentucky v. Louisville R. Co., 39 Fed. (2d) 822, P. U. R. 1930C, 165; Harris Trust & Bank v. Chicago R. Co., 39 Fed. (2d) 958; Columbus Gas & Co. v. Columbus, Ohio, 42 Fed. (2d) 379, P. U. R. 1930D, 476; Todd v. Citizens Gas Co., 46 Fed. (2d) 855; Lumbermens Trust Co. v. Ryegate, Montana, 50 Fed. (2d) 219; Judith Basin Land Co. v. Fergus County, Montana, 50 Fed. (2d) 792; Hoskins v. Orlando, Florida, 51 Fed. (2d) 901; Central Power Co. v. Hastings, 52 Fed. (2d) 487; Corbin, Kentucky v. Joseph Greenspons Sons Iron & Co., 52 Fed. (2d) 939; Petroleum Exploration v. Joseph Greenspons Sons Iron & Co., 52 Fed. (2d) 944.

Alabama. McDonald v. Ward, 201 Ala. 245, 77 So. 835; Culpepper v. Phenix City, 216 Ala. 318, 113 So. 56; Van Antwerp v. Board of Comrs., 217 Ala. 201, 115 So. 239; Andalusia v. Alabama Utilities Co., 222 Ala. 689, 133 So. 899; Alabama Water Co. v. Anniston (Ala.), 135 So. 585.

Arizona. Buntman v. Phoenix, 32 Ariz. 18, 255 Pac. 490; Clayton v. State (Ariz.), 297 Pac. 1037; Tucson v. Sims (Ariz.), 4 Pac. (2d) 673.

Arkansas. Coal Dist. Power Co. v. Booneville, 169 Ark. 1065, 278 S. W. 353; Bank of Commerce v. Huddleston, 172 Ark. 999, 291 S. W. 422; McCoy v. Holman, 173 Ark. 592, 292 S. W. 999; Shull v. Texarkana, 176 Ark. 162, 2 S. W. (2d) 18; Citizens Pipe Line Co. v. Twin City Pipe Line Co., 178 Ark. 309, 10 S. W. (2d) 493.

California. Jardine v. Pasadena, 199 Cal. 64, 248 Pac. 225; Uhl v. Badaracco, 199 Cal. 270, 248 Pac. 917; Mahoney v. San Francisco, 201 Cal. 248, 257 Pac. 49; Mines v. Del Valle, 201 Cal. 273, 257 Pac. 530; Hunt v. Boyle, 204 Cal. 151, 267 Pac. 97; Pasadena v. Chamberlain, 204

Cal. 653, 269 Pac. 630; Los Angeles v. Southgate (Cal.), 291 Pac. 654; Golden Gate Bridge & Co. Dist. v. Felt (Cal.), 5 Pac. (2d) 585; Metropolitan Water Dist. v. Burney (Cal.), 11 Pac. (2d) 1095; Altpeter v. Postal Tele.-Cable Co., 32 Cal. App. 738, 164 Pac. 35; Cooper v. Reardon, 71 Cal. App. 649, 236 Pac. 180; Security Trust & Bank v. Los Angeles (Cal. App.), 7 Pac. (2d) 1061.

Colorado. Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066; Denver v. Mountain States Tel. & T. Co., 67 Colo. 225, 184 Pac. 604, P. U. R. 1920A, 238; Golden Cycle Min. & Co. v. Colorado Springs Light, Heat, & Co., 68 Colo. 589, 192 Pac. 493, P. U. R. 1921A, 314; Newton v. Ft. Collins, 78 Colo. 380, 241 Pac. 1114; Public Service Co. v. Loveland, 79 Colo. 216, 245 Pac. 493; Lamar v. Wiley, 80 Colo. 18, 248 Pac. 1009, P. U. R. 1927A, 175; Inland Utilities Co. v. Schell, 87 Colo. 73, 285 Pac. 771; Public Utilities Comm. v. Loveland, 87 Colo. 556, 289 Pac. 1090, P. U. R. 1931A, 212.

Connecticut. Ansonia v. Ansonia Water Co., 101 Conn. 151, 125 Atl. 474; New Haven Water Co. v. New Haven, 106 Conn. 562, 139 Atl. 99, P. U. R. 1923B, 475; Hartford v. Connecticut Co., 107 Conn. 312, 140 Atl. 734.

Dakota. National Tube Works v. Chamberlain, 5 Dak. 54, 37 N. W. 761.

Delaware. Cutrona v. Wilmington, 14 Del. Ch. 208, 124 Atl. 658, affd. in Cutrona v. Wilmington, 14 Del. Ch. 434, 127 Atl. 421.

Florida. Quigg v. State, 84 Fla. 164, 93 So. 139; St. Petersburg v. Pinellas County Power Co., 87 Fla. 315, 100 So. 509; Walters v. Tampa, 88 Fla. 177, 101 So. 227; Peterson v. Davenport, 90 Fla. 71, 105 So. 265; West v. Lake Placid, 97 Fla. 127, 120 So. 361; Hamler v. Jacksonville, 97 Fla. 807, 122 So. 220.

Georgia. Rome v. Cabot, 28 Ga. 50; Heilbron v. Cuthbert, 96 Ga. 312, 23 S. E. 206; Holton v. Camilla, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199;

Augusta v. Thomas, 159 Ga. 435, 126 S. E. 144; Schlesinger v. Atlanta, 161 Ga. 148, 129 S. E. 861; Clarke v. Atlanta, 163 Ga. 455, 136 S. E. 429; Young v. Moultrie, 163 Ga. 829, 137 S. E. 257; Byrd v. Alma, 166 Ga. 510, 143 S. E. 767; South Georgia Power Co. v. Baumann, 169 Ga. 649, 151 S. E. 513; Macon v. Georgia Power Co., 171 Ga. 40, 155 S. E. 34; Murray v. Waycross, 171 Ga. 484, 156 S. E. 38; Morton v. Waycross (Ga.), 160 S. E. 330; Alford v. Eatonton (Ga.), 162 S. E. 495.

Idaho. Miller v. Buhl, 48 Idaho 668, 284 Pac. 843; Kiefer v. Idaho Falls, 49 Idaho 458, 289 Pac. 81.

Illinois. Fox v. Kendall, 97 Ill. 72; Warren v. Chicago, 118 Ill. 329, 11 N. E. 218; Maffit v. Decatur, 322 Ill. 82, 152 N. E. 602; Chicago, North Shore & c. R. Co. v. Chicago, 331 Ill. 360, 163 N. E. 141; Springfield v. Gillespie, 335 Ill. 388, 167 N. E. 61; Chicago Motor Coach Co. v. Chicago, 337 Ill. 200, 169 N. E. 22, P. U. R. 1930B, 178; People v. Thompson, 341 Ill. 18, 173 N. E. 135; Ward v. Chicago, 342 Ill. 167, 173 N. E. 810.

Indiana. Veneman v. Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. 100; Denny v. Muncie, 197 Ind. 28, 149 N. E. 639; Denny v. Brady, 201 Ind. 59, 163 N. E. 489, P. U. R. 1929A, 625; Stuck v. Beech Grove, 201 Ind. 66, 163 N. E. 483; Stuck v. Beech Grove (Ind.), 163 N. E. 487; Logansport v. Public Service Comm. (Ind.), 177 N. E. 249, P. U. R. 1931E, 179; Huntington v. Morgen, 90 Ind. App. 573, 162 N. E. 255, 163 N. E. 599; Indiana Service Corp. v. Warren (Ind. App.), 180 N. E. 14.

Iowa. Burkitt Motor Co. v. Stuart, 190 Iowa 1354, 181 N. W. 762; Sibbey v. Ocheyedan Elec. Co., 194 Iowa 950, 187 N. W. 560; Ackley v. Central States Elec. Co., 204 Iowa 1246, 214 N. W. 879, 54 A. L. R. 474, P. U. R. 1927E, 325; Muscatine Lighting Co. v. Muscatine, 205 Iowa 82, 217 N. W. 468; Des Moines City R. Co. v. Des Moines, 205 Iowa 495, 216 N. W. 284; Mapleton, Inc. v. Iowa

Public Service Co., 209 Iowa 400, 223 N. W. 476, P. U. R. 1929B, 359; Iowa Public Service Co. v. Emmetsburg, 210 Iowa 300, 227 N. W. 514, P. U. R. 1930B, 29; Johnston v. Stuart (Iowa), 226 N. W. 164; Van Eton v. Sidney (Iowa), 231 N. W. 475, P. U. R. 1930E, 103; Solberg v. Davenport (Iowa), 232 N. W. 477; Mote v. Carlisle (Iowa), 233 N. W. 695; Schmieders v. Pocahontas (Iowa), 234 N. W. 207; Christensen v. Kimballton (Iowa), 236 N. W. 406; Saltzman v. Council Bluffs (Iowa), 243 N. W. 161.

Kansas. State v. Lawrence, 79 Kans. 234, 100 Pac. 485; Keplinger v. Kansas City, 122 Kans. 158, 251 Pac. 413; Wichita v. Clapp, 125 Kans. 100, 263 Pac. 12, 63 A. L. R. 478; Wichita Water Co. v. Public Service Comm., 126 Kans. 381, 268 Pac. 89; State v. McCombs, 129 Kans. 834, 284 Pac. 618; Holton v. Kansas Power & c. Co. (Kans.), 9 Pac. (2d) 675.

Kentucky. Henderson v. Henderson Trac. Co., 200 Ky. 183, 254 S. W. 332; Massey v. Bowling Green, 206 Ky. 692, 268 S. W. 348; Childress v. Riggs, 212 Ky. 225, 278 S. W. 575; Hurst v. Millersburg, 220 Ky. 108, 294 S. W. 788; Wilson v. Covington, 220 Ky. 798, 295 S. W. 1068; Smith v. Kuttawa, 222 Ky. 569, 1 S. W. (2d) 979; Russell v. Bell, 224 Ky. 298, 6 S. W. (2d) 236; Board of Councilmen v. White, 224 Ky. 570, 6 S. W. (2d) 699; Klein v. Louisville, 224 Ky. 624, 6 S. W. (2d) 1104; Poggel v. Louisville R. Co., 225 Ky. 784, 10 S. W. (2d) 305; Jones v. Corbin, 227 Ky. 674, 13 S. W. (2d) 1018; Hardin County Kentucky Tel. Co. v. Elizabethtown, 227 Ky. 778, 14 S. W. (2d) 162; South Covington & c. St. R. Co. v. Henkel, 228 Ky. 271, 14 S. W. (2d) 1068; Panke v. Louisville, 229 Ky. 186, 16 S. W. (2d) 1034; Schoening v. Paducah Water Co., 230 Ky. 453, 19 S. W. (2d) 1073; Russell v. Kentucky Utilities Co., 231 Ky. 820, 22 S. W. (2d) 289, P. U. R. 1930B, 400; Norris v. Kentucky State Tel. Co., 235 Ky. 234, 30 S. W. (2d) 960;

Sturgis v. Christenson Bros., 235 Ky. 346, 31 S. W. (2d) 386; Groover v. Irvine (Ky.), 300 S. W. 904; Campbellsville v. Taylor County Tel. Co. (Ky.), 18 S. W. (2d) 305, P. U. R. 1929D, 547.

Louisiana. Shreveport v. Southwestern Gas & Co., 151 La. 864, 92 So. 365, P. U. R. 1922E, 575; Young v. Bossier City, 154 La. 625, 98 So. 45, 155 La. 652, 99 So. 494; McNeeley v. Vidalia, 157 La. 338, 102 So. 422; Gisclard v. Donaldsonville, 159 La. 738, 106 So. 287; Vicksburg, Shreveport & C. R. Co. v. Monroe, 164 La. 1033, 115 So. 136; Richland Gas Co. v. Hale, 169 La. 300, 125 So. 130, P. U. R. 1930B, 352; Middleton v. Police Jury, 169 La. 458, 125 So. 447; Amite v. Tangipahoa Parish School Board (La.), 123 So. 419, P. U. R. 1929E, 127.

Maryland. West v. Byron (Md.), 138 Atl. 404, P. U. R. 1927E, 286.

Massachusetts. Commonwealth v. Mathews, 122 Mass. 60; Lawrence v. Meltmen, 166 Mass. 206, 44 N. E. 247; Commonwealth v. Rice, 261 Mass. 340, 158 N. E. 797; Loring v. Commissioner of Public Works, 264 Mass. 460, 163 N. E. 82; Town v. Wenham, 267 Mass. 343, 166 N. E. 739.

Michigan. Belding Imp. Co. v. Belding, 128 Mich. 79, 87 N. W. 113; Andrews v. South Haven, 186 Mich. 294, 153 N. W. 827; Jackson City Comm. v. Vedder, 218 Mich. 292, 187 N. W. 702; Walker Bros. Catering Co. v. Detroit City Gas Co., 230 Mich. 564, 203 N. W. 492; Red Star Motor Drivers Assn. v. Detroit, 234 Mich. 398, 208 N. W. 602; Red Star Motor Drivers Assn. v. Michigan Public Utilities Comm., 235 Mich. 85, 209 N. W. 146, P. U. R. 1926E, 411; Bay City Plumbing & Co. v. Lind, 235 Mich. 455, 209 N. W. 579; Michigan United Light & Co. v. Hart, 235 Mich. 682, 209 N. W. 937; Highway Motorbus Co. v. Lansing, 238 Mich. 146, 213 N. W. 79; Worden v. Detroit, 241 Mich. 139, 216 N. W. 461; Benton Harbor v. Michigan Fuel & Co., 250 Mich. 614, 231 N. W. 52.

Minnesota. Central Lbr. Co. v. Waseca, 152 Minn. 201, 188 N. W. 275; State v. St. Paul City R. Co., 180 Minn. 329, 230 N. W. 809; National Cab Co. v. Kunze, 182 Minn. 152, 233 N. W. 838; Guth v. Staples, 183 Minn. 552, 237 N. W. 411; Northern States Power Co. v. Granite Falls (Minn.), 242 N. W. 714.

Mississippi. Southern R. & Co. v. Beekman, 157 Miss. 346, 128 So. 71.

Missouri. State v. Maitland, 286 Mo. 338, 246 S. W. 267; State v. Public Service Comm., 301 Mo. 179, 257 S. W. 462, P. U. R. 1924C, 354; State v. West Missouri Power Co., 313 Mo. 283, 281 S. W. 709; State v. Curtis, 319 Mo. 316, 4 S. W. (2d) 467; Public Service Comm. v. Kirkwood, 319 Mo. 562, 4 S. W. (2d) 773; Dysart v. St. Louis, 321 Mo. 514, 11 S. W. (2d) 1045; Ennis v. Kansas City, 321 Mo. 536, 11 S. W. (2d) 1054; Meyer v. Kansas City, 323 Mo. 200, 18 S. W. (2d) 900; Bell v. Fayette (Mo.), 28 S. W. (2d) 356; Hight v. Harrisonville (Mo.), 41 S. W. (2d) 155; Speas v. Kansas City (Mo.), 44 S. W. (2d) 108.

Montana. Butte v. Montana Independent Tel. Co., 50 Mont. 574, 148 Pac. 384; Helena v. Helena Light & Co., 63 Mont. 108, 207 Pac. 337; Edmunds v. Glasgow, 89 Mont. 596, 300 Pac. 203.

Nebraska. Lincoln Trac. Co. v. Omaha L. & C. R. Co., 108 Nebr. 154, 187 N. W. 790, 28 A. L. R. 960; Metropolitan Utilities Dist. v. Omaha, 112 Nebr. 93, 198 N. W. 858; Omaha & Council Bluffs St. R. Co. v. Omaha, 114 Nebr. 483, 208 N. W. 123, P. U. R. 1926D, 629; State v. Johnson, 117 Nebr. 301, 220 N. W. 273; Carr v. Fenstermacher, 119 Nebr. 172, 228 N. W. 114; Hevelone v. Beatrice, 120 Nebr. 648, 234 N. W. 791.

New Jersey. East Jersey Water Co. v. Newark, 96 N. J. Eq. 231, 125 Atl. 578; Fort Lee Transp. Co. v. Edgewater, 99 N. J. Eq. 850, 133 Atl. 424; Federal Shipbuilding & Co. v. Bayonne, 102 N. J. Eq. 475, 141 Atl. 455; Livermore v. Millville,

85 N. J. L. 655, 90 Atl. 380; Merchantville v. Camden &c. R. Co., 95 N. J. L. 511, 113 Atl. 136; In re Harrison (N. J.), 151 Atl. 215.

New Mexico. Albuquerque v. Water Supply Co., 24 N. Mex. 368, 174 Pac. 217, 5 A. L. R. 519.

New York. Pullman v. New York, 54 Barb. (N. Y.) 169; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; Walton Water Co. v. Walton, 238 N. Y. 46, 143 N. E. 786; Salmon v. Rochester &c. Water Co., 120 Misc. 131, 197 N. Y. S. 769; Sun Printing &c. Assn. v. New York, 8 App. Div. 230, 40 N. Y. S. 607, 75 N. Y. St. 1, affd. in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; Brooklyn City R. Co. v. Whalen, 191 App. Div. 737, 182 N. Y. S. 283; Hesse v. Rath, 224 App. Div. 344, 230 N. Y. S. 676.

North Carolina. Wadsworth v. Concord, 133 N. Car. 587, 45 S. E. 948; Fawcett v. Mt. Airy, 134 N. Car. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. 825; Greensboro v. Scott, 138 N. Car. 181, 50 S. E. 589; Henderson Water Co. v. Henderson Graded Schools, 151 N. Car. 171, 65 S. E. 927; Mabe v. Winston-Salem, 190 N. Car. 486, 130 S. E. 169; Cook v. Mebane, 191 N. Car. 1, 131 S. E. 407; State v. Jones, 191 N. Car. 371, 131 S. E. 734; Edenton Ice &c. Storage Co. v. Plymouth, 192 N. Car. 180, 134 S. E. 449; Pleasants v. Greensboro, 192 N. Car. 820, 135 S. E. 321; Board of Trustees v. Henderson, 196 N. Car. 687, 146 S. E. 808; Holmes v. Fayetteville, 197 N. Car. 740, 150 S. E. 624, P. U. R. 1930A, 369; Mewborn v. Kinston, 199 N. Car. 72, 154 S. E. 76; Bolich v. Winston-Salem (N. Car.), 164 S. E. 361.

North Dakota. Olson v. Erickson, 56 N. Dak. 468, 217 N. W. 841; Chrysler Light &c. Co. v. Belfield, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

Ohio. Alter v. Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737; Newark Nat. Gas &c. Co. v. Newark, 92 Ohio St. 393, 111 N. E.

150, affd. in 242 U. S. 405, 61 L. ed. 393, 37 Sup. Ct. 156, Ann. Cas. 1917B, 1025; United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, P. U. R. 1924A, 801, 29 A. L. R. 342; Travelers Ins. Co. v. Wadsworth, 109 Ohio St. 440, 142 N. E. 900; East Cleveland v. Board of Education of City School Dist., 112 Ohio St. 607, 148 N. E. 350; Lorain St. R. Co. v. Public Utilities Comm., 113 Ohio St. 68, 148 N. E. 577, P. U. R. 1926A, 649; Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N. E. 694; Board of Education v. Columbus, 118 Ohio St. 295, 160 N. E. 902; Western Reserve Steel Co. v. Cuyahoga Heights, 118 Ohio St. 544, 161 N. E. 920; State v. Jackson, 121 Ohio St. 186, 163 N. E. 396; Ohio Elec. Power Co. v. State, 121 Ohio St. 235, 167 N. E. 877; Cleveland v. Gustafson (Ohio St.), 180 N. E. 59; Columbus v. Ohio State Tel. Co., 13 Ohio App. 232, 29 C. D. (39 C. R.) 297, 28 O. C. A. 102, later decision, Columbus v. Public Utilities Comm., 103 Ohio St. 79, 133 N. E. 800; Universal Machine Co. v. Ohio Northern Public Service Co., 13 Ohio App. 271, 32 O. C. A. 525, motion to certify overruled in 65 Bull. 94, 17 O. L. R. 475; Stuver v. East Ohio Gas Co., 13 Ohio App. 276, 31 O. C. A. 554; Steubenville v. Steubenville, E. L. &c. Trac. Co., 13 Ohio App. 493, 31 O. C. A. 513, motion to certify overruled in 66 Bull. 212, 18 O. L. R. 51; State v. Cleveland, 26 Ohio App. 265, 160 N. E. 241; Alcorn v. Deckebach, 31 Ohio App. 142, 166 N. E. 597; Cleveland v. East Ohio Gas Co., 34 Ohio App. 97, 170 N. E. 586; Parks v. Cleveland R. Co., 38 Ohio App. 315, 176 N. E. 472; Ohio Trac. Co. v. Huwe (Ohio), 181 N. E. 114.

Oklahoma. Barnes v. Hill, 23 Okla. 207, 99 Pac. 927; Tulsa v. Thomas, 89 Okla. 188, 214 Pac. 1070, P. U. R. 1923D, 653; Moomaw v. Sions, 96 Okla. 202, 220 Pac. 865; State v. Short, 113 Okla. 187, 240 Pac. 700; Huffaker v. Fairfax, 115 Okla. 73, 242 Pac. 254; Western Oklahoma Gas &c. Co. v. Duncan,

120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277; St. Louis-San Francisco R. Co. v. Andrews, 137 Okla. 222, 278 Pac. 617; In re Murray, 140 Okla. 240, 285 Pac. 80; St. Louis-San Francisco R. Co. v. County Excise Board, 142 Okla. 176, 286 Pac. 345; Ruth v. Oklahoma City, 143 Okla. 266, 287 Pac. 406; Schmoldt v. Oklahoma City, 144 Okla. 208, 291 Pac. 119; Cushing v. Consolidated Gas Utilities Co. (Okla.), 284 Pac. 38; Price v. Water District No. 8 (Okla.), 293 Pac. 1092; Tecumseh v. Butler (Okla.), 298 Pac. 256; Jones v. Blaine (Okla.), 300 Pac. 369; Maney v. Oklahoma City (Okla.), 300 Pac. 642; Alva v. Mason (Okla.), 300 Pac. 784; Ardmore v. Excise Board of Carter County (Okla.), 8 Pac. (2d) 2.

Oregon. Butler v. Ashland, 113 Ore. 174, 232 Pac. 655; McClintock v. Roseburg, 127 Ore. 698, 273 Pac. 331; Yamhill Elec. Co. v. McMinnville, 130 Ore. 309, 274 Pac. 118, 280 Pac. 504, P. U. R. 1929C, 346; Fenwick v. Klamath Falls, 135 Ore. 571, 297 Pac. 838; Union Service v. Portland (Ore.), 298 Pac. 919.

Pennsylvania. Wentz v. Philadelphia (Pa.), 151 Atl. 883.

Rhode Island. East Providence Water Co. v. Public Utilities Comm., 46 R. I. 458, 128 Atl. 556.

South Carolina. McKiever v. Sumter, 137 S. Car. 266, 135 S. E. 60; Briggs v. Greenville County, 137 S. Car. 288, 135 S. E. 153; Green v. Rock Hill, 149 S. Car. 234, 147 S. E. 346; McDaniel v. Bristol, 160 S. Car. 408, 158 S. E. 804.

South Dakota. Lead v. Western Gas & Co., 44 S. Dak. 510, 184 N. W. 244; Mitchell v. Board of Railroad Comrs., 44 S. Dak. 430, 184 N. W. 246; Lead v. Western Gas & Co., 45 S. Dak. 280, 187 N. W. 162; Mitchell v. Mitchell Power Co., 46 S. Dak. 110, 190 N. W. 1013.

Tennessee. Smith v. Nashville, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; Keenan v. Trenton, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519; Bristol v. Bank of Bristol, 159 Tenn. 647, 21 S. W. (2d) 620; Frank-

lin Light & Co. Co. v. Southern Cities Power Co. (Tenn.), 47 S. W. (2d) 86.

Texas. Matlock v. Dallas County Arcadia Fresh Water Supply Dist. No. 1, 118 Tex. 120, 12 S. W. (2d) 181; Denton v. Denton Home Ice Co., 119 Tex. 193, 27 S. W. (2d) 119; Texas Elec. & Co. v. Vernon (Tex.), 265 S. W. 176; Vernon v. Montgomery (Tex.), 265 S. W. 188; Andrus v. Crystal City (Tex.), 265 S. W. 550; Texas Elec. & Co. v. Vernon (Tex.), 266 S. W. 600; Fort Worth v. First Baptist Church (Tex.), 268 S. W. 1016; Belton v. Harris Trust & Co. Bank (Tex.), 273 S. W. 914; Fink v. Clarendon (Tex.), 282 S. W. 912; Griffith v. Sowell (Tex.), 287 S. W. 673; Newton v. Groesbeck (Tex.), 299 S. W. 518; Cameron v. Waco (Tex.), 8 S. W. (2d) 249; Community Nat. Gas Co. v. Northern Texas Utilities Co. (Tex.), 13 S. W. (2d) 184; Haralson v. Dallas (Tex.), 14 S. W. (2d) 345; Matlock v. Dallas Arcadia Fresh Water Supply Dist. No. 1 (Tex.), 14 S. W. (2d) 360; Western Union Tel. Co. v. Wichita County Water Imp. Dist. No. 1 (Tex.), 19 S. W. (2d) 186; Arneson v. Shary (Tex.), 32 S. W. (2d) 907; Dallas R. & Co. v. Bankston (Tex.), 33 S. W. (2d) 500; Community Nat. Gas Co. v. Natural Gas & Co. (Tex.), 34 S. W. (2d) 900, P. U. R. 1931C, 186; La Salle County Water Imp. Dist. v. Guinn (Tex.), 40 S. W. (2d) 892; Uvalde v. Uvalde Elec. & Co. (Tex. Civ. App.), 235 S. W. 625; aff'd. in (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662; Highland Park v. Dallas R. Co. (Tex. Civ. App.), 243 S. W. 674; Malott v. Brownsville (Tex. Civ. App.), 292 S. W. 606; Pulte v. Keel (Tex. Civ. App.), 297 S. W. 241; San Saba County Water Control & Co. Dist. No. 1 v. Sutton (Tex. Civ. App.), 8 S. W. (2d) 319; Dallas County Free Water Dist. No. 9 v. Connor (Tex. Civ. App.), 14 S. W. (2d) 363; Tyrrell & Co. Inv. Co. v. Highlands (Tex. Civ. App.), 44 S. W. (2d) 1059; Tillery v. McLean (Tex. Civ. App.), 46 S. W. (2d) 1028; Witty v. Corpus Christi

§ 64. Rapid transit systems as modern conveniences.—In the case of *Sun Printing & Publishing Assn. v. New York*, 8 App. Div. (N. Y.) 230, 40 N. Y. S. 607, 75 N. Y. St. 1 (affd. in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788), decided in 1897, the court, in answering the question in the affirmative whether a rapid transit railroad wholly within the limits of the city is a city purpose, said: “* * * Cities are not limited to providing for the strict necessities of their citizens. Under legislative authority they may minister to their comfort, health, pleasure or education. * * * To hold that the legislature of this state, acting as the *parens patriae*, may employ for the relief or welfare of the inhabitants of the cities of the state only those methods and agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon the fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state.”

In sustaining the decision of this case and in upholding the power of the city not only to build, maintain, and operate or lease a rapid transit system in the city of New York, but in

Plumbing Co. (Tex. Civ. App.), 25 S. W. (2d) 169; *Ex parte Polite*, 97 Tex. Cr. 320, 260 S. W. 1048; *Ex parte Luna*, 98 Tex. Cr. 458, 266 S. W. 415.

Utah. Mt. Olivet Cemetery Assn. v. Salt Lake City, 65 Utah 193, 235 Pac. 876; *Logan City v. Public Utilities Comm.*, 72 Utah 536, 271 Pac. 961, P. U. R. 1929A, 378; *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878; *Bountiful City v. DeLuca (Utah)*, 292 Pac. 194.

Vermont. Barre v. Barre &c. Power &c. Co., 88 Vt. 304, 92 Atl. 237; *Valcour v. Morrisville (Vt.)*, 158 Atl. 83.

Virginia. Victoria v. Victoria Ice, Light &c. Co., 134 Va. 134, 114 S. E. 92, P. U. R. 1923A, 465, 28 A. L. R. 562; *Portsmouth v. Virginia R. &c. Co.*, 141 Va. 54, 126 S. E. 362; *Hampton v. Newport News & Hampton R., Gas &c. Co.*, 144 Va. 29, 131 S. E. 328; *Kirkpatrick v. Board of Superiors*, 146 Va. 113, 136 S. E. 186; *Mt. Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355; *Roanoke R. &c. Co. v. Brown*, 155 Va. 259, 154 S. E. 526;

Page v. Commonwealth (Va. App.), 160 S. E. 33.

Washington. Chandler v. Seattle, 80 Wash. 154, 141 Pac. 331; *Monroe Water Co. v. Monroe*, 135 Wash. 355, 237 Pac. 996; *International Motor Transit Co. v. Seattle*, 141 Wash. 194, 251 Pac. 120; *State v. Seattle*, 154 Wash. 475, 282 Pac. 829; *Burkheimer v. Seattle (Wash.)*, 299 Pac. 381; *Wylde v. Seattle (Wash.)*, 299 Pac. 385; *Blade v. LaConner (Wash.)*, 9 Pac. (2d) 381.

Wisconsin. Bell v. Plattville, 71 Wis. 139, 36 N. W. 831; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819; *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926D, 290; *Walworth v. Chicago, Howard &c. R. Co.*, 190 Wis. 379, 208 N. W. 877; *Chicago, St. Paul, Minneapolis &c. R. Co. v. Black River Falls*, 193 Wis. 579, 214 N. W. 451; *Wisconsin Gas &c. Co. v. Railroad Commission*, 198 Wis. 13, 222 N. W. 783; *Madison v. Railroad Commission*, 199 Wis. 571, 227 N. W. 10, P. U. R. 1930A, 499; *Milwaukee v. Milwaukee Elec. R. &c. Co. (Wis.)*, 237 N. W. 64.

holding that such city had the power to lease its subway to be operated in connection with a privately owned system for the purpose of securing more convenient service by a more comprehensive transfer system, the court in *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054, decided June 29, 1912, said: "The question is whether the municipality, instead of building subways at an enormous expense over the entire territory, may build them in part of it and then make a contract for their operation with the owner of the privately owned system, under which the latter agrees to operate its system in conjunction with the subways, and subject to a single fare. It seems to me that it may thus do; and that the statement of the proposition very largely supplies the argument in its favor."

A municipality may operate its own street railway system for its own benefit by virtue of its inherent power without a franchise and without assuming the liabilities of franchises, granted to private parties or individuals, such as street improvements and the like. This principle is well expressed in the case of *Cooper v. Reardon*, 71 Cal. App. 649, 236 Pac. 180, where the court said: "Now a city does not require a franchise to operate a public utility for the benefit of its own citizens; that power is inherent in the municipality if authorized by the charter under which it operates. 'It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises.' *City of Pasadena v. Railroad Commission*, 183 Cal. 526, 530, 192 Pac. 25, 27, 10 A. L. R. 1425. Such being the case, when a city is engaged in the operation of such a public utility, it is not controlled by statutory regulations covering conditions to be imposed in the grant of franchises to private corporations or individuals. * * * Therefore, the city is not 'required by law' to keep that portion of the street in order, and the charter sections relating to the apportionment of the cost of street improvements do not apply to a municipality owned street railway."

That municipal corporations, having authority to own and operate street railway systems, may make extensions to such systems under the doctrine of implied powers of municipal corporations, and that all such enlargements of their systems are thus authorized in order to provide adequate, comprehensive, municipal plants is the effect of the decision in the case of *Hunt*

v. Boyle, 204 Cal. 151, 267 Pac. 97, where the court expressed this rule as follows: "It is true that in the designation of such purposes in said ordinance the board did not expressly embrace the item of extensions among the purposes to which when necessary and available such sequestered funds were to be applied; and that, this being so, it might well be that the rule governing the disposition of the moneys accumulated and accumulating in said 'depreciation fund' must first have been devoted to the expressed objects in said ordinance but it would not follow therefrom that the moneys thus collected in said fund, when the aforesaid expressed purposes of its creation were provided for, might not be applied to 'extensions' in the municipal railway system when such were found to be needful, since the section of the charter in question does expressly provide that 'extensions' are to be one of the purposes for which said 'depreciation fund' is required to be set apart. * * *

We are unable to agree with the contention of the appellant herein that the proposed construction of the Judah street and Duboce tunnel addition to the already existing system of municipally owned railways of the city and county of San Francisco is not to be regarded as an extension thereof, within the intent and meaning of article 12 of the Charter thereof. When the people of San Francisco adopted the said provision in said Charter relating to the acquisition of public utilities, they doubtless had in contemplation the creation or acquisition of a system of municipally owned railways which should not only measurably meet the needs of travel and transportation within certain areas of the then existing city, but which should also be made responsive to the increasing needs in the way of travel and transportation of the growing and expanding city; and while it may be true that the governing body of the municipality saw fit upon those earlier occasions when such needed enlargements of the service of its municipal railways were in contemplation to submit the question to popular vote in the form of proposed bonds to meet the cost of their construction, it does not follow that those enlargements of the system were not in truth and in fact extensions thereof, which, having been approved and completed by whatever method, became merely an enlargement and extension of a single and unified system, and as such have been managed, controlled, and operated since their completion."

§ 65. **Motor vehicles.**—In the absence of express statutory authority, the courts, in passing on the question, refused to

sustain the city of New York in the operation of a motor bus or stage line which they held was ultra vires in the case of Brooklyn City R. Co. v. Whalen, 191 App. Div. 737, 182 N. Y. S. 283: "The city of New York has no power or authority to operate bus or stage lines in its streets, unless it be found in a grant from the people, represented in the legislature. * * * The statutes of the state will be searched in vain for any grant of power, express or implied, to the city of New York to operate bus or stage lines such as those we are now considering. * * * The city, acting through the board of estimate and apportionment and the mayor, has been made the agent of the legislature to grant franchises for the use of its streets (section 242 of the charter), but it has no power to confer a franchise on itself; and the power to grant franchises is surrounded by limitations and conditions which have in no wise been complied with in this case."

§ 66. **Modern municipal public utilities practical necessities.**—Among the leading cases permitting cities to provide their citizens with electric light in their private capacity in the absence of any express legislative authority is that of *Fawcett v. Mt. Airy*, 134 N. Car. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. 825, decided in 1903. This case argues the question in issue at length, and indicates the favorable attitude which is taken toward increasing the opportunities for cities to serve their citizens with the comforts and pleasures as well as the necessities of life. It also shows that our courts recognize the fact that with the advance of civilization, the increase of population and its congestion in municipalities, making competition more keen and living conditions more strenuous, what were at one time regarded as luxuries become comforts and are later looked upon as necessities. The case also criticizes the decision of the Massachusetts court in the case of *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397, for refusing to imply this power in municipalities to provide their citizens with these public utilities although it had held the purchase of town clocks, scales, etc., to be a necessary expense. Because of its importance, we quote from the decision at length: "Whether a city or town has the right to incur an indebtedness for the erection and operation of plants for the supply of water and electric light for municipal use, and to sell to its inhabitants, as a necessary municipal expense, is the question again presented to us for decision. Indebtedness incurred by a city or town for a supply of water stands on the same footing as indebtedness incurred for

lighting purposes, and if such indebtedness be a necessary expense, then whether or not a municipality may incur it does not depend upon the approval of the proposition by a majority of the qualified voters of the municipality. * * * It is almost impossible to define, in legal phraseology, the meaning of the words 'necessary expense,' as applied to the wants of a city or town government. A precise line can not be drawn between what are and what are not such expenses. The consequence is that, as municipalities grow in wealth and population, as civilization advances with the habits and customs of necessary changes, the aid of the courts is constantly invoked to make decisions on this subject. In the nature of things it could not be otherwise; and it is not to be expected, in the changed conditions which occur in the lives of progressive people, that things deemed unnecessary in the government of municipal corporations in one age should be so considered for all future time. In the efforts of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress sometimes appears at a serious disadvantage * * * and certainly expenses incurred for water and light are more necessary than those for a market-house, clocks, and scales. The words 'necessary expense,' then, must mean such expenses as are or may be incurred in the establishing and procuring of those things without which the peace and order of the community, its moral interests, and the protection of its property and that of the property and persons of its inhabitants, would seriously suffer considerable damage. * * * If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such lighting is with the authorities of the city or town to determine. * * * Our conclusion, then, is that an expense incurred by a city or town for the purpose of building and operating plants to furnish water and lights is a necessary expense."

§ 67. **Waterworks the oldest and most necessary utility.**—The provision of an adequate water supply for the use of the city and its inhabitants is directly concerned with the public health in addition to being a municipal purpose and for the general welfare. This public utility has always been recognized as necessary for the public health and convenience, and the authori-

ties agree that the municipality should provide a water supply for protection against fire. That an adequate supply of pure water for the citizens of a large city is a necessity which can be provided only by a responsible public or quasi-public corporation is generally admitted. As compared with electricity, the question of a water supply is much older and the law, permitting cities to furnish water from their own plant to their citizens along with providing for the public wants, has become firmly established. In practice it seems to have been very generally assumed that the erection and operation of a waterworks system is a municipal purpose and that the city is expected to furnish it for private use along with attending to the public demand. The courts have recognized the economy of doing this as well as the fact that it tends to the protection of health, life, and property, and is therefore a legitimate exercise of the police power.

A good case expressing the law of this subject is that of *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469, where the only statute in point gave the mayor and city council the power to "provide the city with water by waterworks, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and to organize and establish fire companies." In the course of its well-reasoned decision the court said: "It is seen at once that the waterworks are corporate property; that is not denied. The debate is with respect to the nature of the use. As to that, for the sake of convenience we divide all the purposes for which the city furnishes water into three classes: (1) to extinguish fires and sprinkle the streets; (2) to supply citizens of the city; (3) to supply persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a discussion upon, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants; nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all men can be furnished, in a populous city, only through the instrumentality of well equipped waterworks. Hence for a city to meet such a demand is to perform a public act and confer a public blessing. It

is not a strictly governmental or municipal function, which every municipality is under legal obligation to assume and perform, but it is very close akin to it, and should always be recognized as within the scope of its authority, unless excluded by positive law. Here the first clause [of the statute quoted supra], 'to provide the city with water by waterworks' is very broad and comprehensive, and was obviously intended to authorize the corporation to furnish the inhabitants of the city with water. Having accepted the charter and undertaken to exercise this authority in the manner detailed by the witness, it can not be held that the city, in doing so, is engaging in a private enterprise or performing a municipal function for a private end."

The decision in the case of *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206, rendered in 1895, is placed expressly on the general welfare clause of the charter. The court finds that: "Under the ninth section of the charter of the city of Cuthbert [Acts of 1859, Georgia, p. 149] the mayor and council of that city have authority to 'contract and be contracted with; sue and be sued; * * * and do all things for the benefit of the city, and all things not in violation of the constitution and laws of this state.' It is apparent, therefore, that the 'general welfare clause' in this charter is very broad and liberal in its terms. That the erection and maintenance of waterworks and of an electric light plant would result in benefit to the city is obvious. It was insisted, however, that in order to authorize a municipal corporation to contract a debt for improvements of this kind, the power to do so must be expressly conferred by the charter. We do not concur in this view." While there is no express statement made in this case to the effect that the inhabitants as well as the city were to be supplied with water and electricity, this would seem to have been intended, from a remark found in connection with the statement of the facts of the case that, "this ordinance further provides that all revenue arising from the operation of the waterworks and light plant should be applied first to the expense of their operation, etc."

That the municipality is required to furnish water for the use of its public schools without charge and that a statute requiring it to do so is constitutional is the effect of the decision in the case of *East Cleveland v. Board of Education*, 112 Ohio St. 607, 148 N. E. 350: "The conclusion reached by the majority of the court finds that section 3963, Gen. Code, in so far as it relates to furnishing water 'for the use of the public school buildings in such city or village' without charge, is unconstitu-

tional. There being less than six judges of that opinion, the constitution of the state requires that the judgment of those not concurring shall be controlling, and for that reason the views of the minority are set forth. The petition seeks to recover for water furnished the schools of East Cleveland school district, and claims this right by virtue of sections 3, 4, and 7, article 18, of the Constitution. A demurrer to the petition was filed, which was sustained by the court of common pleas and affirmed by the court of appeals. This action is brought to reverse the judgment of the court of appeals. The basic question is: May an ordinance of a municipality establish a rate and require payment for water used by the board of education for the public schools, other than at the rate allowed and provided for in section 3963, Gen. Code? * * * Entertaining the view that, in the light of the foregoing decisions of this court, and the provisions of the constitution, section 3963, Gen. Code, is a proper exercise of legislative power, in so far as it relates to the furnishing of water for the use of public school buildings in cities and villages, that it is a law of general operation throughout the state, our conclusion is that it is not in conflict with the constitution of the state, and the same should be upheld. Our decision is therefore, that the court of common pleas and the court of appeals were right in sustaining the demurrer, and their judgment in that behalf is therefore affirmed."

This same court, however, in construing this same statute, which the lower court had held to be unconstitutional, sustained the holding of the lower court and upheld the power of the municipality in its right to charge for water service rendered its public schools in the later case of Board of Education v. Columbus, 118 Ohio St. 295, 160 N. E. 902, wherein the authority of a minority of the court to sustain a lower court in upholding the constitutionality of a statute is explained at length: "The city of Columbus brought suit against the board of education of the city school district of Columbus, Ohio, to recover charges for water service rendered by the municipal plant to the public school buildings within the city of Columbus. The board of education defended on the ground that section 3963, General Code, exempts boards of education from such charges. That section provides in part: 'No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water for extinguishing fire * * * or for the use of the public school buildings in such city or village.' The controversy is in every essential detail identical with the case of

City of East Cleveland v. Board of Education of City School District of East Cleveland, 112 Ohio St. 607, 148 N. E. 350, decided May 26, 1925. There has been no change in the personnel of this court since that decision. That decision was rendered by two members of this court; the other five judges dissenting. Two judges were able to render a judgment under authority of a provision in section 2 of article 4 of the Ohio Constitution, which provides: 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.' In the East Cleveland Case, the lower courts had declared section 3963 to be constitutional, and two members of this court were empowered to affirm that judgment over the dissent of the other five. In the instant case, the situation is reversed, the lower courts having declared the statute unconstitutional and void, and a majority of the court have power to affirm that judgment."

An Ohio court sustained the power of the municipality to charge for supplying fire hydrants in connection with the operation of their waterworks system in the face of the statute prohibiting their doing so, the court holding such statute to be unconstitutional and void in the case of *Alcorn v. Deckenbach*, 31 Ohio App. 142, 166 N. E. 597, the court saying: "In so far as sections 3963 and 14769, General Code, or any other section of the General Code, attempt to prohibit the city waterworks department from making a charge for supplying fire hydrants to the fire department of said city, or making a charge for installing said fire hydrants, said sections are unconstitutional and void."

In the absence of express statutory authority, municipal corporations have no power to provide free water service for churches or any other particular purpose and a contract for doing so is invalid and will be set aside, as is indicated in *Ft. Worth v. First Baptist Church* (Tex. Civ. App.), 268 S. W. 1016: "Considered as a whole, we think it is evident that the plaintiff in the petition bases its right for the relief sought, upon a contract with the mayor of the city to furnish water for the purposes specified free of cost. * * * Our attention has not been called to any provision of the charter, or to any ordinance of the city as now constituted, or, as at any time heretofore constituted, which would authorize the mayor of the city to make the contract alleged. * * * From these authori-

ties, we think it must be conceded that the allegations of the petition are insufficient to show ratification of the contract with the mayor. * * * If the contract has been observed for a reasonable time, the city then may thereafter certainly at its will declare the contract at an end. It certainly can not be reasonably held that a contract of that character can be valid for all time and a perpetuity thus established. To so hold would be to bind all future boards of commissioners from interference with the contract."

That municipal corporations, in providing water service to their inhabitants, may hold meters installed by their customers as security for the payment of such service under the provisions of an ordinance to that effect was decided in the case of *Young v. Moultrie*, 163 Ga. 829, 137 S. E. 257, where the court said: "We are of the opinion that the court did not err, under the pleadings and evidence contained in the record, in refusing an interlocutory injunction, for we are of the opinion that petitioners failed to show any such binding contract with the city, made and entered into by the city authorities and petitioners, as would prevent the passage of the ordinance which is attacked by petitioners as being invalid upon several grounds. * * * The city had the right to make reasonable rules and regulations in regard to the introduction of water and lights into the homes of its citizens; but what might be reasonable rules and regulations at one time might become unreasonable at another. Rates for the furnishing of light and water at one time might become unreasonable with the lapse of time and changed conditions. The city had the right to require the installation of meters at the expense of the citizens who availed themselves of the privilege of having cut-ins made for light and water. * * * This is accomplished by means of a meter. It may be that the dominant purpose of its installation is to protect the city. But it may also have a beneficial use to the consumer, in that he is only charged for the water which he consumes. * * * But in the present case there is no intention upon the part of the city authorities to take away the meters which the complainants had purchased, or to deprive them of their property in such meters. They are merely requiring them to 'assign and set the same over to the city as security for and in lieu of the above enumerated amounts required to be deposited, provided such property owner or customer will make such assignment in writing wherein, he shall agree to hold his meter in his possession in trust and as bailee for hire

for said city.' If the ordinance had ended there, it might be that this would amount to a taking of the citizen's property without due process of law. But the ordinance makes the further provision that 'the amount of such deposit or said meters shall be returned to each depositor when such depositor moves from the place where such service is supplied, or when for any reason the same is discontinued; provided the full amount due the city by such depositor is first paid up to the time of the discontinuance of such service.' The court was authorized to find and hold that the part of the ordinance which requires such deposits to be made, or the assignment, for the purposes stated, of the meter, is a means of protection to the city against loss which might be incurred by the removal of a householder without making payment of the accumulated dues for water furnished; and the court was authorized to find that such regulation was not unreasonable."

In sustaining the right of a county to own and operate its own water system and to pay for the same either out of the rates charged for such service or by the sale of county bonds to be met by local taxation, the legal principle involved is expressed as follows in the case of *Kirkpatrick v. Board of Supervisors*, 146 Va. 113, 136 S. E. 186: "We think, therefore, that there is no repugnance in the acts here being considered, and that it was the intention of the legislature to provide two means of financing a publicly owned water system and to leave the choice of means to the people of the communities named. [Citing cases] From these decisions, it is plain that the legislature has the right to grant to any county any functions looking to the advancement of the public welfare not prohibited by the state constitution. The state constitution, unlike the federal Constitution, is a limitation of power, and, unless expressly limited by that instrument, the power of the legislature is unbridled. It has been held by authorities that a county is a political subdivision of the state for the purpose of civil administration of such powers as may be delegated by the state. * * * In the instant case, the tax being a local tax to support local bonds, it is not, in any wise, in contravention of section 50 of the constitution. * * * The act does not provide primarily for the levying of a tax, but authorizes the board of supervisors to fix rates at which water shall be supplied or furnished to customers, and the net revenues derived from this source are to be set aside by the board to pay interest on the bonds and to create a sinking fund. Becoming a customer is optional with

the citizens of the county or the districts thereof, as there is no provision in the act requiring anyone to take water from the system after it has been constructed. * * * It is a mere quibble to say that the act of congress only permits a contract with the Arlington county sanitary board and not with Arlington county. Arlington county and Arlington sanitary board are used interchangeably in the act, and it names the board of supervisors as the party to make the contract with. Both Virginia acts authorize a contract with the War Department of the United States government for the water supply. * * * The board has authority, under the act, to determine the amount of bonds to be issued, from time to time, until the system is completed, and it may not be necessary ever to issue the total of \$750,000. * * * All the districts of Arlington county are to be supplied together and jointly as the board is authorized by the statute to supply them, and, under the broad powers vested in the board, we see no objection to the plan—at least, such as are urged are purely speculative.”

That municipal corporations have sole control over the matter of financing their municipally owned utilities to the exclusion of the public service commission, which is the general rule in the absence of some statutory provision to the contrary, is the effect of the decision in the case of *Wichita Water Co. v. Public Service Commission*, 126 Kans. 381, 268 Pac. 89, where the court said: “It will be noted that, while this act was comprehensive in its scope, it specifically did not include within its provisions, (1) mutual telephone companies, (2) public utilities owned by municipalities, and (3), subject to the right to apply to the public utilities commission for relief as provided in section 33 of the act, it left, or vested, the power to regulate such utilities as are situated and operated wholly or principally within any city for the benefit of such city or its people, exclusively in such city. The matters referred to in section 33 of the act relate to the kind and qualities of service, rates, the extension of the physical properties of the utility, and to providing penalties, and similar matters; they do not relate to the financing of the utilities nor to stock, bonds, or other securities they might issue. Since the power to control and regulate ‘one city’ utilities is vested exclusively in such city, except as provided in section 33, and since the section 33 refers to matters other than the internal financial affairs of the utility owner, it necessarily follows that the Public Utilities Act gives the defendant commission no jurisdiction over such financial affairs of such ‘one city’

utilities. * * * Defendant advises us that in the seventeen years since the enactment of the Public Utilities Act it has not been the practice for mutual telephone companies, municipally owned utilities, or one-city utilities to apply to defendant for a certificate of authority to issue stocks, certificates, bonds, or other evidence of indebtedness. It is reasonable to assume that many such issues have been made. * * * We regard our conclusion that the public service commission has no jurisdiction over the application for a certificate to issue bonds applied for by the plaintiff in this case as being the correct interpretation of the statute."

Where funds for the creation of a water control and improvement district are to be raised by local taxation of the property owners affected, but no limit is placed on the amount of such taxes which may be imposed, the court refused to find sufficient power and authority in the local district, because no sufficient hearing was afforded interested property owners, in the case of *San Saba County Water Control & Improvement Dist. v. Sutton* (Tex. Civ. App.), 8 S. W. (2d) 319, for as the court said: "While the question involved presents no little difficulty, we have reached the conclusion that the * * * provisions of the act, which alone attempt to provide for any hearing, are inadequate to the protection to which property owners are entitled under the due process of law constitutional provisions.

* * * In the creation of such district, the landowners are entitled to a hearing before some tribunal designated or created for that purpose, upon the question both of benefits and of boundaries. * * * In this sentence the question of benefits to the land is not even mentioned, and it is quite apparent that, although power is vested in the commissioners' court to inquire into benefits, it has no jurisdiction to decline the petition because of want of benefits, provided it finds that the district would be a public benefit or utility. * * * It seems manifest to us that there was no intention in the act to grant an original hearing either upon benefits or boundaries. * * * The constitutional provision under which this act was passed places no limit upon the amount of tax burden that may be imposed upon the landowner. In this respect it is unique in this state. The only protection afforded the individual landowner is that found in the due process of law provisions of our state and federal Constitutions. When we take into consideration the general scheme of the act whereby only a preliminary district is first created, with no power in the commissioners' court to

determine the boundaries, and no right in property owners thereafter to a hearing upon that all-important issue, we are still of the view, expressed in our original opinion, that the constitutional guaranties have not been met."

This same court in a later case construing a validating act which corrected the defects found in the former decision sustained the power of the water district to levy the taxes and held that the bonds issued for that purpose were valid by virtue of such validating act. In *Dallas County Free Water Dist. No. 9 v. Connor* (Tex. Civ. App.), 14 S. W. (2d) 363, it said: "The Fortieth Legislature amended this act (1st called Sess., ch. 58, sections 1, 2), curing the defects in the original act that rendered it unconstitutional, and also passed an act (Acts 40th Leg., 1st called Sess., ch. 58, section 3) validating all fresh-water districts theretofore created under the original act. This validating act stipulated, in effect, that the statutory requirements under the original act, creating such districts, must have been performed as a condition to the operation of such validating statute on any district. * * * The record in this case discloses that all these statutory requirements for the creation of a fresh-water district under the original act had been complied with in the creation of this district. It necessarily follows that the appellant district, though invalid when first created, is now a valid and subsisting district; that the bonds issued by said district are valid obligations of the district; that the levy and collection of taxes necessary to discharge this obligation is obligatory on the officers of said district; and that they should not be enjoined from performing such official duties."

That a municipality may make proper charges for water service furnished its school board is decided by the courts of Louisiana in the case of *Amite v. Tangipahoa Parish School Board* (La.), 123 So. 419, P. U. R. 1929E, 127, where the court said: "The town of Amite City claims \$470.95 of the Tangipahoa parish school board on account of water furnished by the town to the school board for use in the public school at Amite City, La. * * * On September 8, 1925, the town by ordinance announced to the school board that a charge would be made for all water above 50,000 gallons per month. The amount which would be charged was not stated. * * * We are not aware of any law which takes from the town the right to charge the school board for water, just as it charges any individual consumer in the town. The evidence establishes that the town furnished water to the extent claimed, and no objection is urged to

the price charged. There was judgment in the lower court in favor of the plaintiff as prayed for, and we think the judgment was correct."

Although a private water supply system under its franchise undertook to furnish water free to churches, public schools, and other like institutions, where the municipality buys the plant "free of all claims, liens, encumbrances and liability whatsoever," the court of North Carolina holds that the ordinance granting the franchise was contractual and that the purchase by the city of the waterworks system repealed the ordinance and left the city free to charge for such water services, after notifying the parties concerned of its intention to do so, in the case of *Board of Trustees v. Henderson*, 196 N. Car. 687, 146 S. E. 808: "In 1892 the defendant enacted an ordinance granting to A. H. McNeal and others, their associates, successors, and assigns, for a period of 40 years, an exclusive franchise to supply water to the inhabitants of the city for fire purposes and other public uses on prescribed terms. In section 9 of the ordinance it was stipulated that the grantees should furnish water free of charge to churches, public schools, and other designated institutions, 'now in use or to be erected.' * * * The franchise of 1892 was granted by the city and was expressly surrendered to the city under the contract and deed of 1926. With its franchise surrendered the water company could not exercise the 'exclusive right and privilege' which the ordinance conferred, and it sold its property to the defendant 'free from all claims, liens, encumbrances and liability whatsoever.' The ordinance which was contractual in its nature was in effect repealed with the express consent of the water company and is not enforceable by either party. * * * The use of the property described in these instruments and purchased by the defendant does not necessarily involve the continued use of the franchise, which was surrendered and which neither of the parties intended thereafter to exercise. * * * As the defendant imposed upon the grantees of the franchise an obligation to furnish water to the schools free of charge, the plaintiffs may have permitted the use of the water by the schools on the assumption that the defendant, though not legally required to do so, would recognize the obligation. Conceding that the defendant was technically under no such obligation, we are of the opinion that the ends of justice would more nearly be met by allowing a recovery only for such water as was furnished after notice was given of the defendant's purpose to make a charge."

§ 68. **Supply of municipal public utilities for private use.**—These authorities, then, will serve to support the principle so far as it is based on the doctrine of implied powers that our courts, for one or more of the three valid reasons above given, permit municipal corporations in connection with supplying their public wants for gas, water and electric light services to furnish these utilities for the private use of their inhabitants. This privilege is found by implication, it is to be noted, only in case it is to be exercised in connection with supplying the public wants; and while most of our courts do not expressly give as a reason for their holdings the economy of such an arrangement, it is submitted that this is a controlling idea underlying their decisions, and it is expressly given in some of them.

§ 69. **Joint public and private service more economical.**—In the case of *Belding Improvement Co. v. Belding*, 128 Mich. 79, 87 N. W. 113, decided in 1901, the court recognized the practical economy of permitting the city to extend the service of public utilities to its citizens for the purpose of securing revenue with which to maintain its public utility plant and provide itself with such conveniences; nor does the court admit the contention made that to find such power to render private service to the individual citizen by implication is either unconstitutional or unauthorized although no authority may be expressly given. In its decision the court said: "It is also contended that this act is unconstitutional, because, by providing that cities may do commercial lighting when they erect municipal plants, it is made broader than its title. We think that commercial lighting may be essential to make a municipal plant self-sustaining, and that a provision for it might, perhaps, be within a reasonable construction of such a title. But we find it unnecessary to decide this question, for the reason that such provision might be eliminated, and leave a valid title."

§ 70. **Ice from municipal waterworks, an economy and necessity.**—The case of *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199, decided in 1910, furnishes an equally clear decision of progressive judicial interpretation of the powers vested in municipal corporations. The decision may be justified by its practical result in securing adequate ice service which is so essentially necessary, under the particular climatic conditions, to the maintenance of the health of the individual and good general sanitary conditions in the city. In permitting the city to furnish ice to the inhabitants in

connection with the operation of its waterworks and electric light system by which the water so furnished would be rendered palatable and healthful, the court seems to have advanced to the position without the support of any authority directly in point. The decision permitting the city to furnish ice in connection with its waterworks system was evidently occasioned in part at least by the economy of such an arrangement as well as the argument in favor of its being in the interest of the health and sanitation and the general comfort of the citizens. The language of the decision and the reasons upon which it is based are sufficiently interesting to justify the following extract: "If a city has the right to furnish heat to its inhabitants, because conducive to their health, comfort, and convenience, we see no reason why they should not be permitted to furnish ice. The object in bringing, by means of a waterworks system, water in pipes from a distance, for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. If, in the hot season of the year, the inhabitants of the city must, for sanitary reasons, relinquish the cool draught from the well, because, as has been demonstrated, wells of pure water can not be maintained in populous communities, surely the city would have the right, were it practicable, to cool the water which it delivers through pipes as a substitute, and which oftentimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why can not the city provide for the delivery of a part of it in a frozen condition, to be used in cooling such part of the balance as is used for drinking purposes? Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks can not be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in a liquid form, we fail to see any reason why it can not furnish it to them in a frozen condition. * * * And if the furnishing of ice to its inhabitants is conducive generally to their health, comfort, and convenience, it is certainly being furnished for a municipal or public purpose. * * * Why, then, in the exercise of its

police power, may not a city guard against impurities in the ice as well as the water used by its inhabitants?"

§ 71. Right to supply private service by implication denied.

—A few courts take issue with this principle of law which is well established by the great weight of authority and hold that, while the power to light the streets and public places of a city by electricity authorizes the erection and maintenance of a plant for that purpose, it may not be used for supplying light to private individuals. These adverse decisions are generally confined to the matter of furnishing electric light, which, of course, is comparatively a very modern public utility, and some of them, at least, can be distinguished from those already discussed and shown not to be actually conflicting authorities.¹⁰

§ 72. Electric light service one of most modern.—One of the leading cases which is apparently opposed to the principle in question is that of *Mauldin v. Greenville*, 33 S. Car. 1, 11 S. E. 434, 8 L. R. A. 291, decided in 1890, in which the court granted an injunction preventing the defendant city from purchasing and operating an electric light plant, so far as it was concerned with supplying private residences. The court admits that there is no power expressly given the city to provide itself with light for public purposes. This decision, therefore, can not be said to oppose the doctrine that where a city has the power expressly given to furnish light for city use it may as incidental to such use and in connection therewith extend the service to private parties. That is to say, in this case the statute fails to grant power in the city to furnish light for any purpose and in any way, so that the court is not passing on the question under discussion in the former cases.

¹⁰ *Alabama*. Posey v. North Birmingham, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

California. Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41; Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722; Cary v. Blodgett, 10 Cal. App. 463, 102 Pac. 668.

Illinois. Palestine v. Siler, 225 Ill. 630, 80 N. E. 345; Ladd v. Jones, 61 Ill. App. 584; Blanchard v. Benton, 109 Ill. App. 569.

Kentucky. Dyer v. Newport, 123 Ky. 203, 29 Ky. L. 656, 94 S. W. 25.

Massachusetts. Spaulding v. Lowell, 23 Pick. (40 Mass.) 71; In re

Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 25 N. E. 469, 10 L. R. A. 122; Spaulding v. Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; Citizens Gaslight Co. v. Wakefield, 161 Mass. 482, 37 N. E. 444, 31 L. R. A. 457.

Nebraska. Christensen v. Fremont, 45 Nebr. 160, 63 N. W. 364.

New Jersey. Howell v. Millville, 60 N. J. L. 95, 36 Atl. 691.

South Carolina. Mauldin v. Greenville, 33 S. Car. 1, 11 S. E. 434, 8 L. R. A. 291.

In this case the court expressed itself as follows: "Clearly, the charter does not give the power to purchase this plant in express words. It does not so give even the power to light the city, but we assume that this latter power may be fairly implied from the grant of the police power. * * * This seems to be a new question. It strikes us as remarkable that, in the multitude of cases cited by the distinguished counsel who argued the case, there should not be in one of them the least reference to this precise point. We have made diligent search, and have not been able to find one. We must decide it, but without any help from authorities. The city has the express power to own property, and it also has the implied right to light the city. Do these powers necessarily imply the right to make the city the owner of the plant and a manufacturer of electricity? It is quite certain that such power is not 'essential' to the declared objects and purposes of the corporation. * * * But considering that some discretion, as to the mode and manner, should be allowed the municipality, in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not ultra vires and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city. But we can not so hold as to the purchase of so much of that plant as furnished the incandescent light for use in the interior of private residences and places of business, which can not be properly included within the power to light the streets of the city. * * * As we understand it, all the powers given to the city council were for the sole and exclusive purpose of government, and not to enter into private business of any kind, outside of the scope of the city government."

This case, then, in refusing the right of the city to accommodate its citizens with modern lighting service for their private use was confessedly decided without the aid of authorities and at most involves the construction of powers existing by implication only to provide for public lighting. While the spirit of the case is hostile it can not be said to be an authority in conflict with the line of decisions above discussed, for they involve the extension of the authority expressly given the city to provide these public utilities for its own wants, and together therewith those of its citizens who desire to avail themselves of the opportunity and are willing to pay therefor. It is further submitted that the decision is not sound and that the court was in error in saying that "all the powers given to the city council

were for the sole and exclusive purpose of government." There can be no question under the law that the powers of municipalities are much broader than this, as common observation shows must be the case in practice.

In referring to this case the court of Nebraska in *Christensen v. Fremont*, 45 Nebr. 160, 63 N. W. 364, decided in 1895, said, "that while the power to light the streets authorizes the erection and maintenance of a plant for lighting the streets, it does not authorize one for supplying light to private buildings." The court then goes on to admit that "the act of 1889 * * * extends the grant of power to the purpose in question," saying: "We have thus elaborated on the grant of powers because the conclusions reached convince us that in the absence of the act of 1889 the city could not have devoted any revenue to the purpose of maintaining a plant to furnish light for private consumers." This case, then, is not an authority in conflict with the principle under discussion for the reason that the decision was made six years after the passage of an act expressly permitting the city to serve its inhabitants with electric light, which act was recognized by the decision as having this effect on the case. These expressions of the court on the subject are mere dicta, having no force of law whatever and were not necessary or proper in the decision, for they are directly contrary to what the court admits to be the law.

Where municipalities are authorized to own and operate public utility plants they are not required to procure certificates of convenience and necessity from public utilities commissions, especially where the payment for such utilities is to be made exclusively from their operation. The courts take the position that in such cases the municipalities and the patrons of their service are alone concerned and that the credit of the city is not involved, so that taxpayers are not interested. This principle is well stated in the case of *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878, as follows: "The right and power of Lehi City to purchase and operate its plant is not questioned or doubted by plaintiffs. They contend such right is subject to the jurisdiction of the public utilities commission, and that therefore the city must procure from that body a certificate of convenience and necessity, to authorize it to enlarge its plant and enter into the business of selling electrical energy to its inhabitants. Plaintiffs urge that, because the city has not procured such certificate of convenience and necessity, the city officials are without authority to enter into the proposed contract.

This exact question was before this court in the case of *Logan City v. Public Utilities Commission (Utah)*, 271 Pac. 961, and was there decided adversely to the plaintiff's contention. Reference to the decision is sufficient to dispose of that question here. * * * It has now become a well-recognized principle of law that these constitutional provisions do not apply to a case where public property is purchased or constructed, and payment therefor is to be made, exclusively from the revenues derived from the property. In the instant case, impounding the earnings of the electric light and power plant in a special fund which is expressly pledged for the purpose of maintaining the plant and the payment of the interest and purchase-price instalments as they accrue under the proposed contract casts no additional burden on the taxpayers of Lehi City. When, as here, a uniform rate must be charged for the product of the plant, the burden falls wholly upon the consumers who pay in proportion to the benefits received by them. In making the purchase, the consumers act entirely upon their own volition. They pay for a product furnished them at their own request, and which is essential to their comfort and convenience. The credit of the city is not extended, nor is any money which is derived from taxation or other existing sources of revenue expended, in the purchase-price or maintenance cost of the plant. The city can not be forced into applying any part of its general revenue for the payment of the purchase-price of the plant or for any part of the cost of maintenance thereof. We are of the opinion that, by entering into the proposed contract with Fairbanks, Morse & Co., Lehi City will not thereby create such an indebtedness as is contemplated and prohibited by section 4 of article 14 of the Utah state constitution."

§ 73. Detailed statutory provisions of Massachusetts strictly construed.—In the case of *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397, decided in 1891, the court denied the defendant the right to furnish light to its inhabitants in the absence of any express statutory power in connection with supplying the streets and public places of the city. The court in this case failed to follow its earlier decisions holding that the providing of clocks, scales and the like is a public purpose and within the inherent power of cities. It can hardly be successfully maintained that supplying light and heat by the municipality for the private wants of citizens in connection with its plant for supplying the public needs is any less a public purpose than the providing of town clocks, scales, and pumps, nor

that the convenience and comfort of its citizens would require the one and not the other. In fact, experience shows that in crowded city life electric light and gas as well as a wholesome supply of water in private houses and places of business are practically necessities, and there can be no doubt that the adequate supply of such public utilities tends very materially to the preservation of public health and peace and to the protection of property. This court had found that the supply of water by a waterworks system is a public purpose and also had conceded that the legislature has unquestioned power to permit cities to provide gas or electric light for the private use of its citizens.¹¹ In refusing to find such power by implication the court said: "It is wholly for the legislature to determine, within the limitations of the constitution, the powers which towns shall possess, and when it appears that the custom of the legislature has been specifically to define from time to time the purposes for which towns may raise money by the taxation of their inhabitants, and when the legislature can at any time grant additional powers if they are deemed necessary, a somewhat strict construction of existing statutes seems reasonable, and in accordance with the presumed intention of the legislature.

* * * The subject of constructing and maintaining gas or electric works for the manufacture of gas or electricity and the distribution thereof through the streets of towns and cities, for the purpose of furnishing light is one of too much importance to be attached as a mere incident to the power given to erect and maintain street lamps, and we think that if the legislature had intended that towns generally should have authority to erect and maintain such works, the authority would have been plainly expressed in the statutes."

In connection with this clearly defined position of the Massachusetts court it should be said that the towns of New England are peculiar in that power must be given them expressly and that money can be raised by taxation only for purposes expressed in the statute or incidental to such purposes. With this in mind it will be seen that the case just mentioned is not applicable to, or binding on, our courts generally for an examination of our city charters will disclose no attempt at such detailed legislation as was found binding on this particular court.

It is of interest to note that after this decision was handed

¹¹In re Opinion of the Justices,
150 Mass. 592, 24 N. E. 1084, 8 L.
R. A. 487.

down, January 12, 1891, the legislature promptly acted upon the suggestion made in the case, and passed a general act, which was approved June 4, 1891, giving any city or town the power to construct, purchase or lease, and maintain within its limits one or more plants for the manufacture and distribution of gas or electricity for furnishing light for the municipal use, or light, heat or power, except for the operation of electric cars, for the use of its inhabitants. This act was passed pursuant to the case of *In re Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487, rendered May 27, 1890, in which the court, in response to the question propounded to it by the legislature, stated that it was within the province of that body to confer upon towns and cities the power to manufacture and distribute gas or electricity for the use of their inhabitants.

This same court sustained a statutory enactment providing for liens upon real estate to which water is furnished by a municipality on the order of a tenant and without authority of the owner in the later case of *Loring v. Commissioner of Public Works*, 264 Mass. 460, 163 N. E. 82: "It must be regarded as settled that in general the legislature may provide for the establishment and enforcement of liens upon the real estate to which water is furnished, even on the order of tenants and in the absence of an express direction by the owner. This is on the broad ground that such liens may aid in providing an adequate supply of water at reasonable rates and hence may be an appropriate element in a scheme of legislation for a public water supply. * * * There is no sound ground on which to rest a contention that the liens impair the contract between the petitioners and their tenant to the effect that the latter should pay all water rates. The liens do not in any respect impair the obligation of that contract. That obligation remains in full force. The lien is simply an additional security to the city. * * * The circumstances that there was unreasonable delay by the city in shutting off the water from the demised premises for nonpayment of the rates and that there was failure on the part of city officers to comply with ordinances and regulations in this respect, do not exonerate the land of the petitioners from the lien."

§ 74. *Rule in Illinois*.—The appellate court of Illinois in *Ladd v. Jones*, 61 Ill. App. 584, decided in 1895, in refusing recovery for electric lighting furnished under an ordinance by the plaintiff city to one of its inhabitants for private use, took the position that such city acted without authority in furnishing the

light because such power had not been expressly granted to it, and expressed itself to the effect that, "powers granted to cities and villages by legislative grant must be strictly construed." It is to be regretted that the case is not discussed more at length so that the reason for the decision might more clearly appear, and also that this case has not been passed upon by the Supreme Court of the state. In the case of *Blanchard v. Benton*, 109 Ill. App. 569, this same court in 1903 indicates that it is still of the opinion expressed in the former case, with which the Supreme Court of Illinois seems inclined to agree.¹²

§ 75. *New Jersey decisions.*—The Supreme Court of New Jersey in *Howell v. Millville*, 60 N. J. L. 95, 36 Atl. 691, decided in 1896, even denied that an act "authorizing the lighting of public streets, and places in the cities, towns, townships, boroughs, and villages of the state and to erect and maintain the proper appliances, etc.," gives the power to a municipality to erect and maintain an electric light plant to light its streets. It is submitted that in view of this express statute the case in refusing to find authority for the city to erect and maintain an electric light plant, for supplying the public wants, is unsound in its reasoning and so narrow in its construction as not only to fail to give effect to the intention of the legislature, but virtually to annul the enactment. The case is unsupported by authorities and does not represent the attitude of our courts outside of the particular jurisdiction.

The attitude of this court has changed, however, for in the case of *Livermore v. Millville*, 85 N. J. L. 655, 90 Atl. 380, decided in 1914, the court said: "The Supreme Court held, and properly, that under the act of 1894 (P. L., p. 477, 3 Comp. Stat. 1910, p. 3548) the city was invested with power to erect an electric light distributing system of poles, wires, etc. (neither the act nor the ordinance contemplated a generating plant), and to raise the required money by taxation; and by the act of 1902 (P. L., p. 782, 1 Comp. St. 1910, p. 938) was further authorized to raise by bond issue money for any purpose for which it might raise money by taxation. Three other objections are advanced. The first is that the system is intended to supply private consumers, as well as to serve the public uses, and that for such private supply there is no statutory authority. An examination of the specifications shows that the present

¹² *Palestine v. Siler*, 225 Ill. 680, 80 N. E. 345.

plan is to construct for public lighting only, but in such a way later on private lighting may be added. We can not see that there is anything illegal in this. It is true that under the statutes relied on private lighting is not authorized. It may be true that a public plant that is adaptable readily to private lighting also may be more expensive than one that is not; but granting this, the question of so constructing the plant is one of business judgment, and it may be excellent judgment so to do in anticipation of a possible enlargement of municipal powers by legislative authority."

This same court in a current case upholds the right of a municipality to acquire the plant of a privately owned water-works company by condemnation, including contracts for service which the company had outstanding, and it may do so without liability or damages to private parties, for as the court said in the case of *In re Harrison* (N. J.), 151 Atl. 215: "At best, the condemnors take over nothing more than the contracts as they presently exist and these appear to have a term of years to run before they expire. We are entirely unable to see how in this respect the acts of 1923 and 1929, *supra*, transgress and come within the constitutional prohibition. Naturally and inevitably the acquisition by the public, or a public agency, of a water supply owned by a utility, removes it from the field of utility regulation. A similar result follows when a city condemns the plant of a local water company. It is urged upon the part of the Passaic Valley water commission that the present applicants are in laches in the present application. We think that is so. * * * In the case before us the only possible interest that two of the applicants have in the subject-matter of the condemnation is that as to certain contracts which they have with the water company, and which *Harrison* has with either or both of these applicants, the condemnor is assuming and taking over the property in them and the obligation of performance by the Passaic Consolidated Water Company. There is no provision in the statutes of 1923 and 1929, *supra*, for awarding compensation or damages to the applicants for such taking as there was in *Stewart v. Hoboken*, 57 N. J. L. 330, 31 Atl. 278, *supra*. For these reasons the court in the exercise of its discretionary power concludes that the application should be denied."

§ 76. *California rule stated.*—The California case of *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41, also refuses to accept the doctrine of implied powers in this connection. It said: "The

terms of the express grant of the power to provide light for the public purposes named do not indicate any intention to give the distinct and larger power to establish a plant for furnishing light for private use to all the inhabitants of the city who may desire it, and no such intention can be imputed to the framers of the charter from the language there employed. * * * The question whether or not, if the city had erected or should erect a plant to supply electric light for the public streets, public places, and public buildings, it would have power to distribute any surplus thereof to the inhabitants for private use does not arise in the case." In the course of this rather arbitrary decision the court unfortunately speaks only very briefly of the reasons for holding that the power of the municipality must be so limited; and no case is discussed or even cited and no authority whatever is referred to except the general definition of the powers of municipal corporations formulated by Judge Dillon over forty years before and probably twenty years before electricity was thought of for lighting purposes as it is now enjoyed.

The case of *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668, very materially limits, if it does not practically reverse, the case of *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41, supra. The decision, however, is based upon a statute which immediately followed and was probably the result of the decision in the *Hyatt v. Williams* case. The General Laws of California, 1906, p. 898, provide that "the board of trustees of said city shall have power * * * to acquire, construct, repair and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of such city or the inhabitants * * * to acquire, own, construct, maintain and operate * * * gas and other works for light and heat." In holding that the city had the power to furnish electric light to the inhabitants as well as to itself, although there was no express provision for furnishing light for the inhabitants the court said: "It seems clear, though, to us that in the grant of power to cities of the sixth class, if not explicitly expressed, it is at least necessarily implied, that the municipality shall have the authority to furnish the inhabitants for private use as well as the general public with electric light. In the grant there is no specification as to the purposes for which the light is to be furnished, and therefore we think no purpose for which such works are usually designed and operated was excluded from the contemplation of the legislature in the enactment of the statute. Indeed, it would be

a strained and unnatural construction of the language used to hold that the works were to be devoted simply to corporate uses. When the city is expressly authorized 'to acquire, own, construct, maintain and operate * * * gas and other works for light and heat,' the incidents of such ownership and right of operation necessarily follow. Appellant's view derogates from the ordinary meaning of the terms used and writes into the statute a restriction of the use, which we have no right to assume was in the mind of the legislature. If the same grant were made to an individual, no one, of course, would contend for such a limitation; but it is sought here because of the idea that it is hardly within the legitimate functions of a municipality to furnish light to its inhabitants. But the modern decisions recognize this as a public use and not outside of the usual range and scope of municipal authority."

The case of *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722, decided by the Supreme Court of California May 31, 1911, was practically identical in its decision with the facts and the legal principle involved in the case of *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668, *supra*. In holding that the city undoubtedly had the power and should be permitted to supply its inhabitants as well as itself with light, the court said: "It is difficult to perceive how the power to supply electricity to the inhabitants of the city for their private use could be conferred in clearer or more appropriate terms. There seems to be no foundation for the argument that the power of the city to procure or produce water, gas or electricity, and supply it to the inhabitants is limited by this provision to the procuring of these substances for public uses alone, such as the watering of public streets, the flushing of public sewers, the lighting of public streets and buildings, or the running of elevators in public buildings and heating the rooms therein. The statement of the proposition, in connection with the provision above quoted, is a sufficient refutation of it."

The court recognized the case of *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668, *supra*, as being in effect identical with the case in question, and as a petition for its rehearing was refused by the Supreme Court, that court held the decision in the *Cary* case as practically a decision by the Supreme Court itself to the effect that "the statute giving power to cities of the sixth class 'to acquire, own, construct, maintain and operate street railways, telephone and telegraph lines, gas and other works, for light and heat' (§ 862, Statutes 1906, p. 898, Munici-

pal Corporations Act), authorized such cities to erect and operate an electric light plant, and thereby supply the inhabitants of the city with electricity for private use."

§ 77. Municipality limited to enterprises of public nature.—

By way of further illustration and definition of the powers of municipal corporations to own and operate municipal public utilities, it may be helpful to discuss at this point the right of such corporations to engage in enterprises ordinarily regarded as being exclusively of a private nature and which are generally carried on by private concerns operating at least theoretically under the natural law of competition. The power of municipal corporations to engage in any business enterprise requiring revenue derived from taxation for its maintenance is limited by constitutional provisions to those undertakings which are public or municipal in their nature or such as are regarded as necessary or incidental to the purposes for which such corporations were created.

That a municipal corporation may not bind itself by the purchase of a ninety-nine-year lease of real estate of rental apartments, because the purchase is not a municipal purpose, but a mere private investment, which is beyond the corporate powers of the city to make is decided in the case of *Hoskins v. Orlando*, 51 Fed. (2d) 901, where the court said: "Hoskins sued the city of Orlando at law to recover two annual instalments of \$10,000 each, with interest claimed to be due on a purchase from him of a ninety-nine-year lease on certain real estate in the city [rental apartments] * * *. On its face the purchase seems a mere investment, and not within the corporate power, * * *. To bind the city to the rental of a house for ninety-eight years at a fixed rate we think is on its face unreasonable."

§ 78. Taxation only for public purposes.—Taxation which takes the private property of the party paying the tax for a private use and for the benefit and support of an individual manufacturer or to engage in the sale of coal, wood, or such like material for fuel which is distinctly a private enterprise would clearly be contrary to the rule that taxes can only be levied for public purposes and within the inhibition of the constitution limiting the power of municipal corporations to municipal or public objects. It is therefore beyond the authority of the municipal corporation to assist or engage in the manufacturing business or in the sale of commodities which are and can be

easily conducted by private business concerns in competition with each other, which serves sufficiently to regulate them.

Since taxes can only be levied for public purposes, a surplus in the water fund of a municipality raised by taxation can only be used for its water system, for as the court said in the case of *Saltzman v. Council Bluffs* (Iowa), 243 N. W. 161: "The city of Council Bluffs owns its water plant, having acquired it in the year 1911. The plant is managed and controlled by a board of three trustees, appointed as by law provided. There has been levied and collected, for the operation of said water plant, the statutory five-mill tax each year and, in addition thereto, the statutory two-mill tax for a sinking fund to retire outstanding bonds and pay interest thereon. * * * The statute under consideration does not seem to be susceptible of more than one construction. It allows surplus earned from the operation of a municipal water plant to be used in certain specified ways. It does not allow surplus accumulated from taxation to be so used. * * * The record discloses, without dispute, that the water fund has been kept in such a way as that the money derived from taxation and the money derived from other sources has been commingled in one fund known as the water fund. It is apparent, therefore, that it can not be said, as a matter of fact, that the money now on hand in the water fund constitutes surplus earned from the operation of the municipal water plant. * * * It must be plain that the legislature never intended to give unto the city or the board of waterworks trustees the power to accumulate any money levied as taxes for the maintenance and operation of the waterworks and use such taxes for the purpose of building any other public buildings. * * * Bearing in mind these pronouncements of the court, we must interpret the intent of the legislature to be that if, in the operation of a municipal waterworks plant, the income from water rentals and the like, other than taxation, exceeds the cost of operation, the remainder is surplus earned from the operation of the plant, or surplus earnings; but that if it requires a part of the taxes levied and collected to meet the cost of operation, then there can be no surplus earnings. We have said that the board of trustees of the waterworks plant are in truth and in fact trustees and that it is their duty to so conduct the affairs of the municipally owned waterworks plant as to make it pay its own way, if possible. We have criticized the board of waterworks trustees for attempting to create a needless surplus. It is the duty of the board of trustees to make their estimates such as that rates for water furnished

the public may be as low as is consistent with good business judgment."

§ 79. Municipal public utilities public and natural monopolies.—The nature of the business of such private enterprises and the way in which their products are distributed make it unnecessary as well as inexpedient that it be conducted as a single enterprise for the entire municipality. On the other hand, such municipal public utilities as water, light, heat, transportation and the improved methods of communication are natural monopolies, which in the interest of economy, the nature of the product and the manner of its distribution makes one system serving the entire municipality the most advantageous manner of furnishing the city and its inhabitants with such public utilities. Being a monopoly in its very nature and because the service of distribution must be comprehensive and should be co-extensive with the city, no opportunity is left for regulation by competition, for the customer has no choice and individually practically no voice in the matter of the service which he receives. This makes governmental regulation necessary and furnishes the occasion for permitting municipal corporations to own and operate or otherwise control municipal public utilities.

§ 80. Private enterprises controlled by competition.—There is no occasion for such regulation or control over private business concerns engaged in individual enterprises, which operate singly and are naturally controlled by competition between the different business concerns providing the same commodity; and the courts have accordingly refused to sustain the attempts of municipalities to conduct a brickmaking business or to engage in the sale of coal and wood as fuel or to assist private manufacturing concerns for the purpose of increasing the general business interests and the prosperity of the particular municipality; and while, as we have already found, the municipal corporation will be permitted to use to the best advantage or to dispose of any surplus energy or capacity, which it may not need at the time for its own use, the courts will not permit the erection by a municipality of a building or the acquirement of a power plant primarily for private use and only incidentally for municipal purposes. To be valid its chief use must be municipal and the disposition to private ends merely incidental. As this principle constitutes a well-defined limitation on the power of municipal corporations in this connection, although its application has to do with enterprises of a private character as distin-

guished from those concerning municipal public utilities, a few cases will be noted by way of illustration of this principle of limitation as applied to matters which are not classified as municipal public utilities.¹³

§ 81. **Power to erect opera houses and hospitals.**—In *Brooks v. Brooklyn*, 146 Iowa 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425, decided in 1910, in refusing to find in the municipality power to build and maintain an opera house, the court said: "We are abidingly satisfied that the building, as planned, is not such a one as the town had authority to build. It is in fact an opera house with all the necessary equipment for such a building. The town offices and the place for the fire department were mere incidents to the building. However desirable it may be for rural towns to have a large assembly hall or opera house, it is not within the power of the town council to build it. The officials are not ordinarily selected to manage theaters or opera houses, and in view of the fact that when so managed the town becomes responsible for their care and safety, and is liable to any one injured by or through the neglect of any of the officials or employees of the city, it is a burden which should not be assumed. There was no need for such a building for municipal purposes, and it is but a thin disguise to cover a purpose not authorized by law."

To the same effect the courts of New Mexico refused to find sufficient power and authority in the city to erect an opera house,

¹³ *United States. Parkersburg, West Virginia v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. 442.

Federal. Sutherland-Innes Co. v. Ewart, 86 Fed. 597; *Iowa Tel. Co. v. Keokuk, Iowa*, 226 Fed. 82, P. U. R. 1916B, 41.

California. Egan v. San Francisco, 165 Cal. 576, 135 Pac. 294, Ann. Cas. 1915A, 754; *Los Angeles v. Lewis*, 175 Cal. 777, 167 Pac. 390.

Colorado. Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066; *Lord v. Denver*, 58 Colo. 1, 143 Pac. 284, L. R. A. 1915B, 306, Ann. Cas. 1916C, 893.

Georgia. Keen v. Waycross, 101 Ga. 588, 29 S. E. 42; *Brumby v. Board of Lights & Waterworks*, 147 Ga. 592, 95 S. E. 7.

Iowa. Brooks v. Brooklyn, 146 Iowa 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425.

Maine. Laughlin v. Portland, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 784.

Massachusetts. In re Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592.

Michigan. Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208; *Attorney General v. Detroit*, 150 Mich. 310, 113 N. W. 1107.

New Mexico. Smith v. Raton, 18 N. Mex. 613, 140 Pac. 109.

Ohio. State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949.

Texas. Nalle v. Austin, 85 Tex. 520, 22 S. W. 668.

Virginia. Lynchburg v. Lynchburg Trac. & Co., 124 Va. 130, 97 S. E. 780.

for as the court said this question is legislative rather than judicial and in *Smith v. City of Raton*, 18 N. Mex. 613, 140 Pac. 109, it decided: "It is not our desire to put a strict construction on the grant of statutory power to municipalities, nor is it our intention to judicially legislate upon the question of the power granted in this instance. It is doubtless true that the power can be given to municipalities to construct opera houses or other public buildings of like character. We fully appreciate that municipalities are called upon in the present day and age for the exercise of powers not heretofore considered necessary to be exercised by municipalities. But, notwithstanding this fact, we believe that it is for the legislature, and not for the courts, to extend the powers of municipalities to meet modern conditions; and, after careful consideration of the statutes quoted, we are constrained to believe that the powers therein conferred must be limited to the erection of such needful buildings as may be required for public uses, or for municipal uses and purposes as contradistinguished from private or quasi-public uses, such as the one under consideration. In considering this phase of the present case, we must bear in mind that the learned district judge found as a matter of fact, and incorporated in his decree, the conclusion that the particular building here in question was about to be erected by the said city of Raton 'as and for an opera house, that the main object of said building, as shown by the plans and specifications introduced in evidence, was an opera house, and all the other uses sought to be made of such building were merely incidental.' * * * We agree that the municipality may allow such portions of such building to be used for other purposes than municipal, either for a stipulated rent or price, or gratuitously, and that in erecting a public building a city need not limit the size to actual existing needs, but may make reasonable provision for probable future needs."

In the case of *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915A, 754, decided in 1913, the court held that charter authority, conferred upon the defendant city, authorizing it to acquire land for "the erection of an auditorium by the Panama-Pacific International Exposition Company, or of an opera house, museum, or other structure, provided the ownership of such structure shall always be vested in the municipality," was not sufficient authority to sustain a contract, vesting in private parties the absolute control and management in perpetuity of an opera house to be erected by such parties on land belonging to the defendant. While deciding that defendant could not

"delegate or part with its right and duty of managing, through its own officers or agents thereunto authorized by law, city property applied to public purposes," the court indicated that "we should hesitate to say that the providing of a place for the production of musical performances was not within the proper scope of municipal activities, as now understood. The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. * * * Generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes. Assuming then that authority to erect and conduct an opera house may be conferred upon a city, the question whether a given municipality has that authority must be answered by a reference to the charter or law defining the powers of the particular municipality. The rule is elementary that municipal corporations have only the powers expressly conferred and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation."

After submitting a proposition to its voters for authority to construct a new city hospital under statutory provisions authorizing such action, the municipality may not, under such authority, buy a residence for the purpose of remodeling and converting it into a city hospital. This modification of the plan is held to be improper and the municipality was denied authority for its consummation in the case of *Alva v. Mason* (Okla.), 300 Pac. 784, where the court decided that: "Under the provisions of section 27, art. 10, of the Constitution, the proposition submitted to the voters may be 'for the purpose of purchasing or constructing public utilities, or for repairing the same.' While the proposition submitted to the qualified property taxpaying voters of the city of Alva might have been for the purpose of purchasing or constructing a city hospital or for repairing the same, the city officials of the city of Alva, in the exercise of their discretion, submitted a proposition for the purchase of a site for, and the construction of, a new city hospital, or, in other words, those city officers elected to proceed in accordance with the provisions of section 27, art. 10, of the Constitution, for the construction of a public utility. While the city officials had discretion as to the form of proposition to be submitted to the voters for their approval, not inconsistent with the provisions of section 27, art. 10, of the Constitution, their discretion thereon ended with the sub-

mission of that proposition to the voters. * * * Since the authority granted was to construct 'a new city hospital,' there was no power in the municipality to become indebted for the purpose of constructing anything other than a new city hospital. * * * Thereafter the city officials, without any authority of law, and in direct violation of the authority asked and granted, attempted to buy a residence building for the purpose of remodeling it and converting it into a city hospital, thus depriving the taxpayers of that community of many valuable rights, including the right to have a new city hospital constructed after competitive bidding in conformity with the statute. The district court of Woods county enjoined the illegal use of the funds derived from the sale of the bonds authorized."

A municipality may establish a hospital on municipal land which had been used for park purposes and against which bonds are outstanding for the payment of its waterworks system. In permitting the erection of a hospital on such property, the court indicated that the security for the payment of such bonds would be enhanced and the value of the land for the benefit of its inhabitants increased, for as the court said in the case of *Massey v. Bowling Green*, 206 Ky. 692, 268 S. W. 348: "As now constructed, the reservoir is amply sufficient in size; and, if the property in question is appropriated to the hospital, the remainder of the tract will be more than sufficient for an indefinite expansion of the waterworks system; hence it can not be impaired by an appropriation of this spot for the purposes indicated. Although the land is under a lien to secure the payment of the waterworks bonds, an appropriation of a part thereof by the city to its own use in the establishment of a hospital would not release the lien or be inconsistent with it, but the erection of a building thereon would add to the security of the bondholders. * * * But the property belongs to the city, and it will continue to control both the waterworks and the hospital, though conducted by separate departments of the municipal government, and the wisdom of the procedure is for the council to determine and not for us. Certainly it is not a sale or encumbrance upon the waterworks property as contemplated by the statute quoted. * * * Public parks are essential to the proper enjoyment of urban life, and their establishment and maintenance should be encouraged in every legitimate way; but to irrevocably establish such a park or dedicate municipal property thereto by user there should be such action upon the part of the city and so continued for such a length of time as to

manifest a clear and unequivocal intention for the property to be devoted to that purpose only. * * * It will readily be seen that the improvements suggested were of a character that would enhance the value of the land for any purpose, and it can not be said that this would irrevocably establish a park."

§ 82. **Brickmaking a private business.**—The case of *Attorney General v. Detroit*, 150 Mich. 310, 113 N. W. 1107, 121 Am. St. 625, decided in 1907, illustrates the limitation placed upon municipal corporations, where the court refused them the right to enter the field of competition and private business undertakings. In addition to such an attempt being beyond their power, it was held to be both unnecessary and unfair to permit municipalities to engage in an ordinary private enterprise which competition controls and regulates, because in doing so it would operate to the disadvantage of the private citizen engaged in that line of business and finally result in his forced withdrawal from the business; and so holding, the court spoke as follows: "We agree with the opinion filed in the circuit court that the power to engage in the business of brickmaking is not included in the powers expressly granted to the city, and that it is neither fairly implied in, nor incident to, such powers as are expressly granted; nor is it indispensable or even essential to the declared objects and purposes of the corporation. While the law permits municipal corporations to do those things which are necessary to accomplish the objects of their creation, under an implication of power¹⁴ the right has not usually been held to go so far as to permit them to engage in the manufacture of articles necessary to their lawful enterprises, where they are in common use and are to be had in the open market."

§ 83. **Sale of coal and wood as a municipal or public purpose.**¹⁵—The case of *In re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592, decided in 1903, furnishes an excellent statement of this principle together with the reason upon which it is founded in the following terms: "It is established that under our constitution private property can not be taken from its owner except for a public use. This is equally true whether the property is a dwelling-house, taken by right of

¹⁴ *Dillon Mun. Corp.* (5th ed.), § 237, 8 Civ. Law 1062.

¹⁵ The case of *Laughlin v. Portland*, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, in 1914 decided such to

be a public purpose because concerned with an "indispensable necessity," adding that, "in the case of fuel, the practical difficulty is caused by the existence of monopolistic combinations."

eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government, there is no way to obtain the money except by taxation. Money can not be raised by taxation except for a public use. * * * If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for, if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessities of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities. * * * The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise, with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned."

In 1914, however, by virtue of a special statute of Maine authorizing cities to own and operate fuel yards, the city of Portland was sustained in conducting such an enterprise for its citizens in *Laughlin v. Portland*, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, where the court said: "The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today. * * * On the other hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now. * * * If, then, science has advanced so far that the heating as well as the lighting of

houses by electricity were now a practicable method, there would seem to be no doubt that this also would fall within the realm of public purposes. The heat would be conducted from the central power station by means of wires along or under the public streets, the same as light is now. Or suppose it were practicable to install a central heating plant and conduct the heat through pipes in the streets to the various buildings, much the same as water or gas is now conducted, we see no reason why this too should not be called a public use. * * * Let us look at the question from the practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution, and, if the legislature had the power to authorize municipalities to furnish heat to its inhabitants, 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered, and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways, but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legislature, which is the only question before the court, and not the wisdom of its exercise, which is for the legislature alone. Cases directly in point are lacking. We have been unable to find anywhere that the issue has been squarely decided. The principle, therefore, seems to be conceded that, if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned textwriters. Dillon, *Municipal Corporations* (5th edition), section 1292; McQuillin, *Municipal Corporations* (1912), section 1809. In the case of fuel, the practical difficulty is caused by the existence of monopolistic combinations. The mining, trans-

portation, and distribution of coal has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of a few. The difficulty and practical impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage in quantity. All this is a matter of common knowledge and can not be overlooked by the court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use. But it is urged: Why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market, or a bakery? The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise, for which there may be many substitutes, but with an indispensable necessity of life; and, more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition, in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle, it would be our duty to pronounce the act unconstitutional, but, in our opinion, it does not. The element of commercial enterprise is entirely lacking."

To the same effect, in sustaining the power of the city to establish and operate a municipal fuel yard because it is a public purpose, is the decision in the case of *Central Lbr. Co. v. Waseca*, 152 Minn. 201, 188 N. W. 275.

§ 84. **Municipality can not assist private enterprises.**—That the city will not be permitted to assist private individuals in their private enterprises any more than it will be permitted to enter into such lines of business itself and for the same reason naturally, is well stated in the case of *Parkersburg, West Virginia v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. 442, decided in 1883, as follows: "But we are of opinion that, within the principles decided by this court in the case of *Loan Association v. Topeka*, 20 Wall. 655, the bonds in question here are void.

The act of 1868 authorizes the bonds to be issued as the bonds of the city. The principal and interest are to be paid by the city. The bonds are to be lent to persons engaged in manufacturing. * * * The city is to pay the principal and interest of the bonds, according to their tenor, whether the 'borrower' pay the city or not. No other source of payment being provided for the city, the implication is that the city is to raise the necessary amount by taxation. * * * A legitimate use of the moneys so raised by taxation is to pay the debts of the city. Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person. * * * There was no provision in the Constitution of West Virginia of 1862, authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business. This being so, the legislature had no power to enact the Act of 1868."

Where, however, the private use of surplus power or water is in issue, the municipality may provide such services for private use, because they are merely temporary and incidental to its municipal supply and service and also furnish an advantageous means of disposing of a surplus, which is generally permitted, for as the court said in the case of *Nalle v. Austin* (Tex.), 22 S. W. 668: "Would it be wise economy to risk a failure of a water supply, and the consequent damages to the property of a city, and to the health of its inhabitants and to so construct the work, at an increased expense, as to provide against future conditions dependent upon facts of an indeterminate character? Again, a dam of the character indicated in the report is not a work for a few years, but is one which may be expected to stand as long as the city itself. The city, the capital of the state, will hardly remain stationary at a time when all other cities in the country are growing with great rapidity. Was it, under the circumstances, an exercise of a provident discretion to disregard the future, and provide only for existing necessities? Or was it an act of prudence to look to the future, and to make provision for prospective wants? These are not questions for the courts to answer. They were all to be considered and determined by the city council, in passing upon the proposition to construct the dam. If they have determined that a dam of the dimensions specified in the engineer's report is requisite in order to secure the power necessary to provide water in any probable contingency resulting from drought, or to meet in future the wants of an increased population, can it be said that they have clearly ex-

ceeded their authority, even though they may have contemplated that for a time, at least, there may be an excess of water power, which may be available for other purposes and may bring a revenue to the city? * * * The use of any excess of power which might be developed was merely a probable and contingent result. Under such circumstances it would seem that the proposed constructions must speak for themselves, and that any inquiry from other sources as to the hidden motives of the city council is not to be permitted."

§ 85. **Municipal plumbing not incidental to its waterworks.**—The case of *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42, decided in 1897, conceding that the municipal corporation has the power to own and operate its waterworks system and take all necessary steps in order to render proper service in that connection, held, however, that it was not necessary for the city to engage in the plumbing business for the reason that such service could be furnished at the hands of private parties and that such power was never intended to be conferred upon the city. In its decision the court spoke as follows: "It was doubtless the intention of the legislature to confer power upon the municipal authorities to do everything essential to the establishment and maintenance of the city's waterworks system, to provide for proper sanitation, and to promote the general success of the enterprise; but, surely it was never contemplated that the city should engage in a general plumbing business, and, in the course thereof, sell supplies and materials to private citizens, and do contract work in placing the same upon their premises. As incident to the general powers conferred upon the waterworks commissioners, it was lawful for them to order all work done which was necessary for connecting the city's mains with the pipes of water consumers, or for protecting the city's property from injury or destruction, or for requiring citizens to pay for the water furnished to them, but they could not, without overstepping the bounds of their authority in the premises, engage in a business purely for gain, and the carrying on of which was not essential to the accomplishment of any of the purposes above indicated."

§ 86. **Home rule charter—Municipal coliseum and other structures.**—On the other hand the case of *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066, decided in 1905, furnishes an interesting example of progressive legislation and constitution making. In sustaining the power of the city of Denver to erect and maintain a large hall suitable for the use of national conven-

tions and the like as well as for assemblies of its own citizens, and for the graduating exercises of the city schools, the court only gave effect to legislative action which conferred upon this city practically all the power possessed by the legislature, as provided for by the constitution in granting what is popularly described as "home rule" for Denver. The case goes far beyond the general rule under which, as we have seen, home rule is not permitted the municipal corporation. In the course of its decision the court said that: "The purpose of the twentieth article [of the constitution] was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the legislature; and so it was declared in the article that, until the adoption of a new charter by the people, the charter as it then existed should be the charter of the municipality; and, further, that the people of Denver shall always have the exclusive power of making, altering, revising, or amending their charter; and, further, that the charter, when adopted by the people, should be the organic law of the municipality and should supersede all other charters. It was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver every power possessed by the legislature in the making of a charter for Denver. * * * There is no apparent reason why the taxpayers of Denver may not, under a constitutional provision limiting the power to assess and collect taxes to the 'purposes of such corporation,' by vote order the erection of an auditorium for public purposes, even though it be incidentally used for conventions and national associations."

That by virtue of its implied powers the city may contract for liability insurance against liability to the public for injuries or death caused by the maintenance and operation of its electric light and power plant is clearly established in the case of *Travelers Insurance Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711, where the court held: "The controlling question in this case is whether a village in the state of Ohio has the power, through its board of trustees of public affairs, to contract with an insurance company to insure itself against liability to members of the public on account of injuries or death caused by the maintenance and operation of a municipal electric light and power plant and lines. * * * When a municipality is engaged in operating a municipal plant, under an authority granted by the general law, it acts in a business capacity, and stands upon the same footing as a private individual or business

corporation similarly situated. Pond, Public Utilities, section 11; 4 McQuillin on Municipal Corporations, section 1801; 3 Dillon on Municipal Corporations (5th edition), section 1301.

* * * It has been expressly held that power to maintain a public building includes the power to contract for fire insurance.

* * * There being no practical distinction in protecting a business from loss by fire and from loss by liability, we consider this case an authority in favor of the power of the village to make the contract."

Under its Home Rule Charter a municipality was permitted to erect and maintain a city natatorium, because such an enterprise was regarded as a public utility and for the public convenience of the inhabitants. This principle is enunciated in the case of *Belton v. Harris Trust &c. Bank* (Tex. Civ. App.), 273 S. W. 914, as follows: "When that charter was adopted the city became a municipality under the Home Rule Amendment (Const. art. 11, section 5, as amended in 1912), which provides: 'Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city.' This provision placed an absolute limitation of not exceeding two and one-half per cent of the taxable value; and granted the power to levy such taxes, within that limit, as might be prescribed either by general law or by charter. * * * Applying this test to the certificates which the city officials furnished the attorney general, and upon the facts contained in which he approved the bonds, we think there can be little, if any, room to doubt that those certificates were binding upon the city. * * * As to the 1923 warrants, the further contention is made that they were invalid to the extent of certain original warrants, which, according to the list embraced in the refunding ordinance, were for the purpose of maintenance of the city natatorium; the contention in this regard being that the city had no power as a municipal corporation to incur expense, create a debt, or levy taxes for such purpose. This contention was made in *City of Belton v. Ellis* (Tex. Civ. App.), 254 S. W. 1023. It was overruled by this court, and writ of error refused. In disposing of the question, which was the controlling one in the case, this court, speaking through Associate Justice Jenkins, said: 'We hold that the facts in this case show that the bathing pool was a public utility, and that the city was authorized under its charter to operate the same.' We hold that the trial court did not

err in his rulings respecting these warrants or in rendering judgment thereon."

§ 87. **Regulation of motor vehicles.**—Under this doctrine of implied powers the courts have generally sustained the right of municipalities to regulate and control the use of their streets for profit by motor vehicles operating thereon as common carriers for hire. Under the general principle of the implied powers of municipal corporations and the general welfare clause of their charters, in addition to the authority afforded them by their police power, the courts have universally recognized that municipal authorities may make reasonable regulations for the operation within their limits of motor vehicles as common carriers and that, if they have such a privilege, the city may require the payment of reasonable license fees and the giving of bonds or liability insurance for the protection of passengers and the public generally against negligence in the operation of such motor vehicles. Other reasonable regulations which the courts have sustained include the exclusion of motor vehicles operating for hire from certain crowded streets and congested areas together with requirements for the inspection and equipment of such motor vehicles in the interest of safety. As motor vehicles in using streets and highways as a place for conducting their business for profit enjoy a special privilege or permit they may be required to pay a reasonable fee for doing so and are subject to municipal regulation in the interest of safety and for the convenience of the public which they seek to serve as well as their own passengers. As the court in the case of *Quig v. State*, 84 Fla. 164, 93 So. 139, said: "Under the charter the city may regulate the use of jitney busses on the streets in any reasonable way that conserves the public welfare, and in doing so may circumscribe their privileges in the use of the streets; but no authority for the quoted ordinance entirely excluding jitney busses from the streets is shown."

This principle of the right of the city to regulate and control the use of its streets by motor vehicles operating as common carriers for hire is well expressed in the case of *Ex parte Polite*, 97 Tex. Cr. 320, 260 S. W. 1048, as follows: "In the same ordinance are prescribed regulations upon which the license to engage in the jitney service may be obtained, the amount of fee required, and the conditions upon which the city may refuse the license, or, after its issuance, revoke or cancel it. * * * In argument relator insists that the ordinance grants a franchise to the 'jitney service' owners, and that it does not authorize a

mere license. That it is difficult to formulate an accurate and comprehensive definition of the term 'franchise' is recognized by courts and textwriters. * * * A municipal corporation, under its general powers, has the right to make the distinction between those operators of automobiles who use the streets for ordinary purposes and those who use them in pursuit of their occupation or business. * * * Nothing is discerned in the ordinance granting the use of the streets inconsistent with the right of travel or with the rights of abutting owners. It does not vest any exclusive privilege nor limit the power of the city over the control of the streets. In fact, it confers no privilege or immunity of a public nature to 'jitney service' men, but, as applied to them, is restrictive, in preventing them from conducting their business in the street, a privilege which they may legally exercise, except for the intervention of the law-making power of the city. This court is impressed with the view that the right sanctioned by the ordinance is wanting in the essential elements of a franchise, but that it may be properly classified as a license or privilege."

A further discussion of this principle and an illustration of its practical application is furnished in the leading case of *Cutrona v. Wilmington*, 14 Del. Ch. 208, 124 Atl. 658 [affd. in 14 Del. Ch. 434, 127 Atl. 421], where the court said: "That motor busses may be used in such manner would seem to be clear. The evidence shows that the busses in question were large vehicles having a seating capacity of eighteen persons and that on one occasion, according to the inspectors, as many as thirty passengers were observed therein, some of them crowded about the driver in such way as to interfere with his vision. At present nineteen busses are operating in the city. Considering their size, the amount of traffic on the city streets, the fact that busses in their movement are not confined to any portion of the streets as are trolley cars, that their equipment and maintenance should be kept at a high standard and their operation entrusted to skillful and careful drivers, it would seem manifest that regard for the safety of those who ride in the busses as well as consideration for the safety, convenience and rights of others using the highways would suggest a logical relation between the business of operating them and a regulation of the use of the streets. No man has the right to use the public streets as a place wherein to carry on his private business. * * * This complainant in the operation of his busses was engaged in using the streets of the city for the prosecution of

a private business conducted thereon. So far as I have been able to discover the authorities are overwhelming to the effect that he has no inherent, no constitutional, right to carry on such a business. *Huston v. City of Des Moines*, 176 Iowa 455, 156 N. W. 883; *Greene v. City of San Antonio* (Tex.), 178 S. W. 6; *Schoenfeld v. City of Seattle*, 265 Fed. 726; *Cummins v. Jones*, 79 Ore. 276, 155 Pac. 171; *Frick v. City of Gary*, 192 Ind. 76, 135 N. E. 346; *Dent v. Oregon City*, 106 Ore. 122, 211 Pac. 909; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404; *Harris v. Atlantic City*, 73 N. J. L. 251, 62 Atl. 995. * * * Thus far we have arrived at the conclusion that the city of Wilmington, by virtue of its power generally to regulate the use of its streets and to exercise entire jurisdiction and control over the same, has the power to regulate or even prohibit the use of the streets by operators of motor busses. * * * If the conclusion heretofore reached, viz., that the citizen has no inherent or proprietary right to use the streets for the prosecution of his private business is correct, then the fact that the municipality chooses to provide for exceptions to a general prohibition in favor of those to whom it grants consent, is not, under the principle of the foregoing cases, open to objection. It is true that such a situation is exposed to the danger of favoritism and prejudice."

That municipal corporations by ordinance may regulate the operation of jitney busses as common carriers for hire in the use of their streets is clearly and forcibly stated in the case of *Denny v. Muncie*, 197 Ind. 28, 149 N. E. 639, as follows: "The ordinance by its other sections fully regulates the operation of jitney busses on the streets of the city. No objections are raised to the other parts of the ordinance. * * * It can not be controverted that jitney busses are common carriers. And the municipal ordinances regulating the jitney traffic as a class apart from other common carriers have been enacted in many of the principal cities of many states. In the absence of express statutory authority in the matter of municipal regulation of jitneys, municipal ordinances in regard to same have generally been upheld when based on general statutes vesting in cities the right to control and regulate the use of their streets. *Pond on Public Utilities* (3d ed.), section 766. * * * The public streets are for the use of the public, and may be used for general, ordinary use. But the use of a street to carry on a private business is a mere privilege, and not a natural right. * * *

* * * The operation of jitney busses on the public streets as

a private business, being a matter of privilege and not of right, can be permitted by the city upon such terms as it may prescribe or may be prohibited. Pong on Public Utilities (3d ed.), section 753. * * * As the appellant did not have any natural right to carry on his business on the streets, no property has been taken from him by the ordinance without just compensation. * * * That the effect of the ordinance, if enforced, would involve a benefit to the street railway company is no reason why the city may not prescribe such regulation."

This same court sustained an ordinance of the same city of Muncie which regulated the service and fixed the rates for motor vehicles operating within its limits in the later case of *Denny v. Brady*, 201 Ind. 59, 163 N. E. 489, P. U. R. 1929A, 625, the court saying: "It follows that appellee is empowered by statute to operate motor vehicles for the transportation for hire of passengers and freight. * * * In our opinion the city's offer to permit the operators of busses to furnish service under stated terms and conditions and the acceptance of the offer, of the license, and of all the terms of the ordinance or franchise, which bound the bus operators to give a definite service constituted a furnishing of motor transportation 'by color of a contract' within the terms of section 5, ch. 46, Acts 1925. It follows that the city of Muncie is within that class of cities from which the grant of power to the public service commission over local busses as common carriers was excluded, and that the city ordinance under consideration is not invalid because it regulates service, fixes rates and controls competition, and that the lower court erred in granting the temporary injunction."

In holding that municipalities may regulate or even exclude taxicabs from operating on their streets for private gain, the Illinois court expressed this rule as follows in the case of *People v. Thompson*, 341 Ill. 18, 173 N. E. 135: "The Public Utilities Act does not take from cities and villages the previously conferred power to regulate taxicabs. The taxicab business, as a general rule, does not include the operation of a conveyance or vehicle over specified routes, under a regular schedule as to time or between definite points, and hence, within the meaning of the Public Utilities Act, a taxicab is not ordinarily a public utility. * * * The ordinance is not discriminatory on the ground that it singles out taxicabs for regulation and does not apply to private vehicles or other public vehicles drawn by horses. No one has any inherent right to use the streets or highways as a place of business. Where one seeks a special or

extraordinary use of the streets or public highways for his private gain, as by the operation of an omnibus, truck, motorbus, or the like, the state may regulate such use of the vehicle thereon or may even prohibit such use."

This same court, however, had denied authority to municipalities to refuse motor vehicles the right to operate as public utilities on their streets and had held that power over motor vehicles operating as public utilities resided in the public utilities commission by virtue of a legislative enactment. The court expressed this rule as follows in the case of *Chicago Motor Coach Co. v. Chicago*, 237 Ill. 200, 169 N. E. 22, P. U. R. 1930B, 178: "To authorize the exercise of any power by a city a statute must be shown expressly granting the power or making a grant in such terms as necessarily imply its existence. The absence of such grant excludes the power. Statutes granting powers to municipal corporations are strictly construed, and a reasonable doubt of the existence of the power must be resolved against it. The city, in exercising the power granted to it by the legislature, acts as the agent of the state, and the legislature may at any time change its agent and by another statute provide that the power previously exercised by the city shall be exercised by some other agency. * * * The city has therefore never had the power to prohibit the operation of automotive vehicles on the city streets. * * * Regulation is inconsistent with prohibition or exclusion. * * * The language of the act is sufficiently comprehensive to subject every phase of the relations between every public utility and the public to supervision and regulation of the public utilities commission. * * * These provisions certainly covered the whole field of service of every utility. They left no room for the exercise of authority of any other body."

The Ohio court refused to find authority in a municipality for prohibiting the operation on certain of its streets, over which street car or interurban lines were situated, of motor busses, operating beyond the limits of the city as well as within the city. In the course of its opinion the court spoke as follows in the case of *Nelsonville v. Ramsey*, 113 Ohio St. 217, 148 N. E. 694: "The ordinance then proceeds to prohibit the operation of any motorbusses on any street or avenue 'On, or along or over which street car or interurban car lines are now constructed and on, or along or over which street cars or interurban cars are operated.' * * * Frankly then the controversy must narrow down to one of power of the municipality to pass such an or-

dinance. In order to justify the same, it must be a reasonable police regulation and as applied to the situation of a transportation line, which is interurban and not purely intraurban, we are constrained to the conclusion that its enactment was beyond the letter and spirit of section 614-86, General Code, authorizing municipalities to pass reasonable police regulations and, being inconsistent with the provisions of the act in question, the court of appeals was right in reaching the conclusion that it did, to-wit, in restraining the city from enforcing the ordinance in question."

In sustaining the power of a municipal corporation to regulate motor vehicle traffic for hire operating on the streets of the city, the court expressed this rule as follows in the case of *Red Star Motor Drivers Assn. v. Detroit*, 234 Mich. 398, 208 N. W. 602: "It must be accepted as settled by *Melconian v. City of Grand Rapids*, 218 Mich. 397, 188 N. W. 521, that plaintiffs are common carriers for hire, and that cities may prohibit the use of their streets by them for the conduct of a business for gain.

* * * I think if the city has the right to prohibit the use of all its streets by a common carrier, and we so held in that case, it has the right to prohibit the use of a part of them by a common carrier. * * * But, in considering this question, we must bear in mind that we are determining a legal question as to whether the regulation is unreasonable as matter of law rather than a question of policy which must rest in the legislative department of the city. * * * In most of the states of the Union the municipalities possess only such power as is delegated to them by the legislature and delegated by express terms. This was true here before the Constitution of 1909. But the people by that instrument (section 28, art. 8) took from the legislature certain of its former powers over municipalities and reserved to them reasonable control over their streets in the following language: 'The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.' This is an expansion of the powers of municipalities rather than in derogation of them (*People v. McGraw*, 184 Mich. 233, 150 N. W. 836). * * * There is a marked difference between the street car and the jitney, both in construction and operation, and the record discloses that the motor busses quite closely resemble the street car in their operation. * * * They operate on fixed schedules and over fixed routes at low rates, give transfers, and pay as specific taxes for the use of the street around

\$50,000 a year to the city. * * * I have considered at length cases which to my mind are persuasive that we should sustain the validity of this ordinance, that sustain the majority rule. * * * The legislative department of the city of Detroit has determined that this ordinance is for the public welfare, for the public good. Courts of last resort are daily enforcing police regulations that no member of the court would vote for if they were sitting as legislators. But sitting as members of the court they determine, not the policy of the regulation, but the two questions: (1) Has the municipality the power to enact the regulation? (2) Has such power been so arbitrarily and capriciously exercised as to make the regulation unreasonable and deprive the complaining party of their constitutional rights? With due regard to our function in the case, I think we should declare the ordinance before us valid."

This same court, in sustaining the power of municipal corporations to regulate motor vehicles operating for hire upon their streets where the service was entirely inter-city and thereby excluding regulation by the public utilities commission, reasoned as follows in the case of *Red Star Motor Drivers Assn. v. Michigan Public Utilities Commission*, 235 Mich. 85, 209 N. W. 146, P. U. R. 1926E, 411: "The question raised is whether the public utilities commission has jurisdiction of the operation of common carriers by motor vehicles whose termini are wholly within two cities whose territory is contiguous. * * * It is clear from the language of section 1 of the act that the legislature intended to make a distinction between highways in cities and villages and highways in the country. It vested the power in the commission to regulate common carriers by motorbus on the highways in the country, and in the country and in cities and villages, but withheld the right to regulate the operation of them where the termini were both within cities or villages. In other words, when they operated wholly on city or village territory, the commission was without jurisdiction. When they operated in the country or in the country and city and villages, the commission had jurisdiction. The test of jurisdiction seems to be a question of territory. If they operated wholly in the city of Detroit the commission would have no jurisdiction. If they operated wholly in Springwells the commission would have no jurisdiction. The territory of these two cities is contiguous. A motorbus passing from the city of Detroit into the city of Springwells would give the commission no jurisdiction, because no country highway is involved. The motorbus, in passing from

the city of Detroit to the city of Springwells, is at all times on city territory, and therefore beyond the jurisdiction of the commission. While the motorbus is in the city of Detroit it is regulated by Detroit's council. When it passes the line into Springwells it is regulated by Springwells' council."

This rule of the right of the municipality to regulate the use of its streets by common carriers in the conduct of their business is further defined and established even as against the legislature itself in the case of *Highway Motorbus Co. v. Lansing*, 238 Mich. 146, 213 N. W. 79, where the court said: "There, as here, a common carrier sought the use of the streets of the city for the conduct of its business. There, as here, the city invoked against such use its constitutional prerogative to the reasonable control of its streets. This constitutional provision, so long as it continues in force, secures such reasonable control to municipalities; we so held in that case. Such reasonable control may not be taken from them by the courts, by individuals, by administrative bodies, or by the legislature itself. * * * In this case, as in the case of *Red Star Motor Drivers Association v. City of Detroit*, 234 Mich. 398, 208 N. W. 602, there is testimony of inconvenience to passengers and loss to the operators of busses if the ordinance is enforced, and this was much pressed on the argument, and it was urged that its provisions are so arbitrary as to take them beyond the domain of reasonable control of the streets. The same argument was urged in the other case, but was overruled. It must be overruled here, unless we enter the domain of policy of the legislation. This we may not do."

Municipalities may not regulate motor vehicles operating beyond their limits and engaging only in interstate commerce, because the regulation of such commerce resides in the federal authorities and if, as the courts have held, the state may not regulate it where such regulation interferes with federal regulation, obviously municipalities have no such power of regulation. This rule is well expressed in the case of *International Motor Transit Co. v. Seattle*, 141 Wash. 194, 251 Pac. 120, where the court said: "Respondent International Motor Transit Company is a Washington corporation, engaged in the business of carrying passengers for hire by means of auto stages between Seattle, Washington, and Portland, Oregon, and respondent Hartman is a driver of one of its auto stages. He had not obtained a 'for hire' driver's license as required by section 103 of the Seattle License Code. Under the allegations of the complaint, the state

had issued a license to respondent Hartman, authorizing him to drive on all highways of the state. The complaint also alleged that respondents are not carrying passengers for hire within the state of Washington, but only between Seattle in this state, and Portland in Oregon. * * * We have no doubt that under our statutes and the cases above cited [see report] the ordinance is not in conflict with the state laws when applied wholly within the city of Seattle, and that it is manifest that the ordinance was so intended. It is intended to apply to 'for hire' vehicles as distinguished from auto stages. 'For hire' vehicles, as provided in section 6313, Rem. Comp. Stats., are defined to mean all motor vehicles other than automobile stages used for the transportation of persons for which transportation remuneration of any kind is received, either directly or indirectly. On the question of interference with interstate commerce, the Supreme Court of the United States has very definitely decided the matter. * * * The court in that case [Buck v. Kuykendall, 267 U. S. 308, 69 L. ed. 623, 45 Sup. Ct. 324, 38 A. L. R. 286] held that the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce; that its effect upon such commerce is not merely to burden, but to obstruct it; that such state action is forbidden by the commerce clause (Const. U. S., art. 1, section 8, subd. 3). If the state may not so regulate, as was held by the last-cited case, certainly the city, an inferior public corporation, having merely delegated powers from the state, can not do so."

Under the provisions of a home rule charter the court of Minnesota sustained the power of the municipality in licensing taxicabs to regulate their use of the streets, including the right to revoke the license at any time, in the case of National Cab Co. v. Kunze, 182 Minn. 152, 233 N. W. 838, as follows: "Under the City Home Rule Charter, c. VIII, section 1, the control of the streets rests with the city council, which is also authorized to license taxicabs, chapter IV, section 5. The council issued the license involved to plaintiff. The charter, c. IV, section 16, provides that 'any license issued by authority of the city council may be revoked by the mayor or council at any time * * *'. We construe these provisions of the charter as not self-executing. * * * We are of the opinion that the ordinance is valid. Plaintiff had a right to review by certiorari the action of the council in revoking the licenses."

Municipal regulations which are not arbitrary or unreasonable and the making of reasonable charges are within the power of

the city to exercise in connection with its control of its streets. In the course of such regulation, the municipality is permitted to designate certain parking spaces or stands as is indicated in the case of *Fenwick v. Klamath Falls*, 135 Ore. 571, 297 Pac. 838, where the court held: "Where the city has a right to regulate a business, it has also the inherent right to charge against that business a reasonable sum for such regulations. This court can not say as a matter of law that the license fees exacted under this ordinance are excessive, nor does the plaintiff complain that such fees are excessive; his only complaint being that he is being doubly taxed. * * * These provisions in themselves are not arbitrary or discriminatory, and operate alike upon all persons in the same class. The granting of the license is not an arbitrary power under the ordinance. The license can only be refused when it interferes with the proper regulation of traffic. This section does not prevent the plaintiff from loading or unloading at any point on the street, but prevents him from parking at any other place than the place specified except when the car is actually under hire. * * * The court will presume, until the contrary is shown, that the administrative body to which the power is delegated, will act with reasonable regard to property rights. * * * Ordinance No. 2044 is a valid exercise of the police powers of the state delegated to the city of Klamath Falls. It does not infringe any of plaintiff's constitutional rights."

Where the state has expressly regulated drivers of motor vehicles in the use of the highways of the state, including the streets of cities and towns, the municipality is not permitted to enforce a similar regulation, and a city ordinance attempting to do so, which is in conflict with the state statutory regulation, is invalid, as is indicated in the case of *Clayton v. State* (Ariz.), 297 Pac. 1037, the court speaking as follows: "That the regulations of the Highway Code were intended to apply to city streets is not only manifest from the title of the act as originally passed, but from its various provisions, wherein the speed of motor vehicles in business and residential districts is fixed (section 1587); * * * . Under section 1574 the matter of 'local parking and other special regulations' is left in the control of the governing body of the city; that is, matters of peculiar local concern are left with the local authorities. * * * We have this situation: The sovereign state and one of its agencies, the city of Phoenix, have legislated upon the identical subject-matter, for the same purpose, to wit, to secure the safety of travel

upon the highways of the state. * * * The state, acting through its legislature, has plenary power over the highways of the state, including those within cities and towns. * * * The charter of the city of Phoenix does not expressly empower the legislative body of the city to pass by-laws regulating drivers of motor vehicles in the use of its streets and public ways. * * * While the Highway Code in many respects, as is shown by our analysis thereof, has delegated or left to municipalities certain powers over their streets and highways, it has by most direct and positive provision retained power to regulate the condition of drivers of motor vehicles in the use of the highways of the state, including those in cities and towns. * * * There is no power, either express or implied, in the charter authorizing the legislative body of the city of Phoenix to pass a by-law making it a crime to drive a motor vehicle on highways while under the influence of intoxicating liquor. * * * It has been held that a state-wide motor vehicle law making the driving of a motor vehicle while under the influence of intoxicating liquor a felony, or a high misdemeanor, in the discretion of the court, supersedes a local city ordinance making the same act a misdemeanor, on the ground that the condition of the driver of a motor vehicle was of state-wide concern. * * * It follows, then, that section 55 of Ordinance No. 1492 of the city of Phoenix is invalid, and that the court was without jurisdiction of the defendant or the subject-matter."

Where by legislative enactment motor vehicles were required to pay a license fee to operate over the state highways and the state license system was intended to be exclusive, all local municipal ordinances requiring the payment of license fees for such purposes were superseded and became invalid, as is clearly pointed out in the case of *Childress v. Riggs*, 212 Ky. 225, 278 S. W. 575, for as the court said: "It thus is made manifest by the clear and unambiguous language used to express its intention that the legislature intended that when an auto transportation company paid the fees required and was licensed to operate over the highways of the state of Kentucky, all local ordinances, resolutions, by-laws, rules, and license fees in force should cease to be operative as to them. Clearly, under that section of the statute, the ordinance in question, in so far as it undertakes to impose municipal license fees upon automobiles engaged in the service of an 'auto transportation company,' within the terms of that act, is illegal and void. * * * In fixing the license fees to be paid upon the vehicles used in operating auto transporta-

tion companies, the legislature evidently took into account both the earning capacity of the vehicles and the damage they would cause to the highway, because the scale of fees is graduated according to the seating capacity of the vehicles. In providing that the vehicle with a carrying capacity of five persons or less should be licensed at a lesser sum than a vehicle with a greater carrying capacity, the legislature evidently took into account the fact that such a vehicle would be lighter, and therefore would cause less damage to the highways, and would, because of its limited seating capacity, be capable of earning for its proprietors less money than one with greater seating capacity."

So long as the license fee required of motor vehicles operating for hire on the streets of a municipality are not unreasonable, for the purpose of paying the necessary expense of police regulations, the person paying a license has no ground of complaint because of the use the municipality may make of the fund. This principle is clearly stated in the case of *Panke v. Louisville*, 229 Ky. 186, 16 S. W. (2d) 1034, where the court said: "The license being issued under the police power, only an amount that is reasonable can be charged. But it is of no concern to the person who pays for the license that the city spends other money for police purposes and uses this money to pay its debts. The proof shows that the license fees are not sufficient to pay the necessary expenses of police regulations, and that the city in fact pays out more money for this purpose than it receives for licenses. The sinking funds are only a branch of the city government, and, so long as the amount of the license is reasonable, the person who pays for the license can not complain that the city puts the money in one pocket rather than another. Lastly, it is insisted that the state motor law is exclusive, Acts 1920, p. 415. But that act is simply an act, by its title, relating to vehicles requiring licenses to be obtained from the state officers and regulating vehicles on the state highways. Neither by its title nor by anything in the act are the powers of the cities of the state in any way referred to or regulated. Repeal by implication is not favored."

That the municipality may, by proper ordinance, regulate the operation of motor vehicles within its limits and may charge a fee for doing so, sufficient to cover the cost of such regulation, is the effect of the decision in the case of *Union Service v. Portland (Ore.)*, 298 Pac. 919, where the court said: "Ordinance No. 40468 of the city of Portland is applicable to all persons operating cars in the same class as plaintiff, and is not arbitrary,

confiscatory, nor discriminatory and is not unconstitutional. *Fenwick v. Klamath Falls (Ore.)*, 297 Pac. 838. * * * It will thus be observed that in addition to the rules and regulations laid down by the public service commission governing the operation of such cars outside as well as within the city limits of incorporated cities and towns, there is still left with the cities and towns the right to regulate the operation of such cars within their limits and to charge a fee covering the cost of such regulatory service. *Cummins v. Jones*, 79 Ore. 276, 155 Pac. 171; *Dent v. Oregon City*, 106 Ore. 122, 211 Pac. 909; *Parker v. Silverton*, 109 Ore. 298, 220 Pac. 139, 31 A. L. R. 589; *Fenwick v. Klamath Falls*, *supra*. It does not manifestly appear that said Ordinance No. 40468 is a revenue raising ordinance, or that it is anything more than a mere regulatory ordinance requiring a fee sufficient to cover the cost of such regulation. *Parker v. Silverton*, *supra*."

By virtue of statutory enactments municipalities in Texas have as great a power over the regulation of jitneys, operating in their streets, as the legislature possesses, and without violating any constitutional right, they may classify such motor vehicles and regulate even to the point of excluding them from the use of the streets. Such is the effect of the decision in the case of *Ex parte Luna*, 98 Tex. Cr. 458, 266 S. W. 415, where the court expressed the rule as follows: "Giving effect to the legislative act and the charter mentioned, it would seem that the city of El Paso, acting through its constituted authority, would have as great power over its streets, so far as relates to their use by vehicles, as would the legislature. * * * The authority of the municipalities to enact restrictive ordinances affecting jitneys has been upheld by the courts of this state upon many occasions. * * * It has been definitely stated in several cases in this state that there exists no inherent right in any individual or corporation to operate jitneys upon the public streets. * * * Our examination of the declarations of both text-writers and courts force the conclusion that in the enactment of the ordinance in question the city of El Paso was within its charter powers and did not transcend constitutional limitations, either in interdicting the use of its streets by jitneys or by putting them in a separate class."

Where, however, municipal corporations are limited to a license or registration fee of one dollar for motor vehicles there is no authority for imposing a privilege tax of five dollars, and an ordinance to that effect is held invalid in the case of *State v.*

Jones, 191 N. Car. 371, 131 S. E. 734: "It will be seen, then, that the fees for the registration and licensing of motor vehicles include the cost of registration, permits, licenses, certificates, and plates, and exclude all other state and local taxes except an ad valorem tax and a license or registration fee of \$1.00, which may be charged by a county, city, or town. But no county, city, or town shall charge or collect an additional fee under the guise of a chauffeur's license for the privilege of operating a motor vehicle, although the governing authorities may regulate, license, and control chauffeurs and drivers, and charge therefor a reasonable fee. The ordinance imposes the tax on the owner, not on the driver. Upon payment of such license, the tax collector shall give the owner a plate which shall be attached to his vehicle; and any person who, after a designated time, operates a motor vehicle owned by a resident of the city when the plate is not attached shall be guilty of a misdemeanor. The ordinance does not purport to regulate, license, or control chauffeurs and drivers, but it purports to impose a privilege tax of \$5.00 on the owner of the car, and by the terms of the statute this tax can not exceed \$1.00. It follows that the ordinance is invalid, and that the prosecution must fail."

A municipality has no power by ordinance to discriminate between motor busses of the same class operating upon its streets, nor does its police power justify an ordinance based on such power to avoid congestion in its streets, where the facts do not sustain the necessity for such regulation, as is clearly established in the case of *Schappi Bus Line v. Hammond*, 11 Fed. (2d) 940, where the court reasoned as follows: "Without conceding the right of the city, in any event, to control the operation of motor busses under its police power, since the passage of the Moorhead Act and the Registration and Licensing Act, being chapters 46 and 213 of the 1925 Acts of the Indiana General Assembly, we are of opinion that the ordinance can not be sustained as a police regulation, and it is not claimed that it can be sustained upon any other theory. * * * Even police regulations must be fair and reasonable for all citizens alike, so far as may be, and without discrimination. The ordinance in question does not respond to these requirements. By its terms, it permits some concerns to do the identical things from the doing of which appellee claims it has the right, under the ordinance, to exclude appellant. Though not so written in the ordinance, the fair intendment of the whole record is that the ordinance was written, not only for the purpose of permitting

that condition of things, but for the purpose of enforcing it. We are of opinion that the record does not show any valid reason for the passage of such an ordinance because of congestion in the streets. * * * It could not make its contract with the Calumet Motor Coach Co. an excuse for not making that concern subject to the terms of the ordinance. If it had such police powers as it undertook to exercise, it had no right to barter them away to the Calumet Motor Coach Company. We are of opinion that, for the reasons stated, the ordinance is illegal and void."

CHAPTER 6

THE CONSTITUTIONAL LIMITATION OF MUNICIPAL INDEBTEDNESS

Section	Section
90. Municipal indebtedness defined.	103. Bonds for purchase of water-works.
91. Precaution against improvidence.	104. Payment same as by "special assessments."
92. Distribution of cost of municipal public utilities.	105. Park-land purchase certificates.
93. Indebtedness defined and distinguished.	106. Option agreements of purchase.
94. Expense of plant and of necessary service distinguished.	107. Option to purchase water-works.
95. Instalment payment purchases.	108. Purchase of an electric light plant.
96. Purchase of encumbered property.	109. Debt accrues as service is furnished under serial contracts.
97. Contract obligations payable in future.	110. Necessary service payable from current revenue.
98. Encumbering property before sale to municipality.	111. Debt only created when service furnished.
99. Debts payable out of special fund.	112. Current service payable out of current revenue.
100. Bonds payable from revenue of plant.	
101. "Mueller law" certificates.	
102. Purchase-price payable only out of revenue of plant.	

§ 90. **Municipal indebtedness defined.**—Municipal indebtedness is a further constitutional limitation upon the power of municipal corporations to own and operate municipal public utilities in addition to that constitutional limitation already discussed, restricting the power of municipalities to provide themselves only with such municipal public utilities as are concerned with and included in "municipal purposes" within the meaning of the constitution. The power of municipal corporations to engage in any commercial enterprise requiring revenue to be raised by taxation is necessarily limited by the constitution to such business undertakings as come within "municipal purposes," for it is only such purposes that may be supported by taxation.

"Indebtedness" is defined as a liability for which the city has no assets or ability to pay, for as the court in the case of *First National Bank v. Jackson*, 199 Ky. 94, 250 S. W. 795, said: "Or-

dinarily, of course, one is indebted, although he may be abundantly able to pay; but, under a constitutional provision that no municipality shall incur an indebtedness beyond a certain amount, the word 'indebtedness' is ordinarily held to mean the contraction of an obligation of which there is no present means of payment. * * * Therefore, it seems to us, that the only street bond indebtedness beyond the city's ability to pay is the difference between the entire indebtedness and the amount on hand to the credit of the sinking fund. As this difference, added to the waterworks bond issue, will not exceed five per cent of the assessed value of the taxable property in the city estimated as required by the constitution it follows that the proposed indebtedness will not exceed the constitutional limit."

That the payment of rent under a lease agreement in order to provide for the completion of a city hall by the city of Albuquerque is, in effect, the payment of interest on the money to be advanced for the purpose and amounts to the creation of an "indebtedness" is the effect of the decision in *Palmer v. Albuquerque*, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106, where the court held: "There is no other conclusion to be arrived at, in considering the facts of the present case, but that property of the city of Albuquerque of the approximate value of \$35,000 is pledged or mortgaged, to secure the repayment of \$25,000 to be advanced by the defendant bank for the completion and furnishing of the city hall. Unless the latter sum, with interest, is repaid, the city would lose its property, and, as stated by Mr. Dillon, the borrowing of the money and its reception contemplate that it shall be repaid, and the pledging of the existing property of the city necessarily implies an indebtedness for which the property pledged is bound, even if the creditor have no general recourse against the city and its funds. It is therefore our opinion that the borrowing of money on the security of property already belonging to the municipality, without giving the lender any recourse against the body corporate or its property other than the particular property pledged to secure the money advanced, if the constitutional limitation of municipal indebtedness be thereby exceeded, is the creation of indebtedness, within the prohibition of the constitution."

While the sanitary needs for a sewerage and waterworks system may be imminent, the court refused to find a "case of emergency," which would permit the municipality to exceed its constitutional debt limit, for the reason, as the court said, that to do so would have the effect of wiping out the provision for the

constitutional debt limitation in many cases. This is the effect of the decision in the case of *Hurst v. Millersburg*, 220 Ky. 108, 294 S. W. 788, where the court said: "Under the provisions of section 158 of the state Constitution it can not incur a bonded indebtedness in excess of three per cent of the assessed valuation of \$15,000, 'unless in case of emergency the public health or safety should so require,' * * *. The adjacent schools with their problems, as well as the enterprise of these people in seeking the development of the town and of their institutions, appeal strongly to the court. But we are unable to distinguish this case from *Marion v. Haynes*, 157 Ky. 687, 164 S. W. 79, as to the size and congestion of the town, the sanitary conditions, and the need of a waterworks system. To uphold appellee's contention, we must overrule that case and give a new meaning to the word 'emergency.' This would likely enable every incorporated town in the state to incur an unlimited indebtedness for the construction of waterworks, because it is no doubt true that none of them have perfect sanitation and that the difference in their condition is one of degree rather than in basic facts, and each one could show some special cause for such action. We do not feel justified in doing this."

This same court, however, in a later case permitted the issuance of bonds which were not in excess of the constitutional debt limitation in order to avoid an unusually heavy tax rate with which to make full payment in cash. This decision is found in the case of *Wilson v. Covington*, 220 Ky. 798, 295 S. W. 1068, where the court said: "It will thus be seen that the issuing of these bonds will not increase the indebtedness of the city beyond the constitutional limits. To impose upon the people of the city a tax sufficient to make the deferred payment and meet the other payments as they are due would be to impose upon them a heavy burden in one year. To avoid this the city was authorized, in the discretion of the municipal authorities, to issue funding bonds in a case like this to avoid a very heavy rate of taxation in one year. The city commissioners did not exceed their authority in issuing the bonds, and the circuit court properly dismissed the petition."

The issuance of refunding bonds does not constitute municipal indebtedness because their proceeds are used to pay existing bonds, and where these have been issued under proper authority the interest rate of the refunding bonds rests in the discretion of the municipal authorities, as is indicated in the case of *Bolich v. Winston-Salem* (N. Car.), 164 S. E. 361, where the court said:

"A municipal corporation does not contract a debt, within the meaning of section 7 of article 7 of the Constitution of this state, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. 44 C. J. 1132. The bonds in the instant case will not be invalid because their issuance was without the approval of a majority of the qualified voters of the city of Winston-Salem. Nor will their validity be affected by the fact that when issued they may bear a rate of interest in excess of the rates which the bonds to be refunded bear, provided such rate does not exceed six per cent. N. C. Code of 1931, section 2951. The maximum rate of interest fixed by statute for the bonds to be refunded was six per cent. The fact that the bonds, when issued, bore rates of interest less than six per cent, does not determine the rate at which the refunding bonds may be issued. The rate of interest which bonds issued by a municipal corporation shall bear is fixed by the governing body of the corporation, in its discretion, within the statutory limitation. It is expressly provided by the statute that the period within which refunding bonds shall mature shall be determined by the governing body of the corporation. * * * Of course, the proceeds of the sale of the refunding bonds and of the loan anticipation notes can be applied only to the payment of the bonds which are to be refunded. When this shall have been done, the indebtedness of the city of Winston-Salem, incurred by statutory authority and with the approval of a majority of the qualified voters of the city, will not have been increased."

§ 91. **Precaution against improvidence.**—As an additional precaution against the improvidence of municipalities, the constitutions of our different states have placed an express limitation upon the power of such corporations, which in most of the state constitutions is absolute and without regard to the object to be attained by the exercise of the power in any particular case. While the amount of municipal indebtedness which is permitted by the constitutions of the different states varies slightly, as a general rule the municipality may not become indebted for more than five per cent of the taxable value of its property. This limitation on the municipality of its power to incur debt has been imposed because of the frequent serious abuse of the exercise by the municipality of its power and discretion to the point of improvidence. The tendency to acquire municipal public utilities and other conveniences beyond the present financial ability of the particular city through a bond issue payable by the

next or succeeding generations rather than in part, at least, by the generation which first enjoys the convenience of such public utilities became so general and the amount of indebtedness thus assumed, the payment of which was so far postponed, was so serious that the various states were obliged to restrict this tendency by limiting the amount of indebtedness which the municipality could incur by constitutional provisions to that effect.

While the limitation of municipal indebtedness is established as a precaution against improvidence, where there is no fraud and there has been proper approval by the voters as required by law and no violation of the limitation of municipal indebtedness is found, the measure involved will be sustained, as is indicated in the case of *Metropolitan Water Dist. v. Burney* (Cal.), 11 Pac. (2d) 1095, where the court said: "In brief, defendant offered to show that the district owned no water rights, and that the cost of bringing water from the Colorado River would be far in excess of \$220,000,000. No charge of fraud was made, but counsel for defendant sought to examine the engineer and some of the officers of the district on the matters upon which their conclusions were based. It does not appear that anything was attempted save to dispute the facts upon which the board reached its conclusion. This was ruled immaterial by the court, and we think the ruling was proper. The board was required to make a plan and estimate of costs, which it did. The proposition to incur a certain indebtedness for the purpose of carrying out this plan was approved by the voters. If the good faith of the board is not attacked, there is nothing in the plan or estimate which is subject to judicial review."

Since the provision of the constitutional limitation of municipal indebtedness is intended as a precaution against improvidence, the court will not presume that the amount of the indebtedness allowed the municipality has been increased unless the statute expressly or clearly indicates this to be the legislative intention; and where the city is attempting to issue bonds for the construction of a bridge, the amount of such bonds will be added to the present municipal indebtedness in order to determine whether their issuance will exceed the legal indebtedness, although the plan provided for the payment of all tolls to be collected from the bridge in satisfaction of the bond obligation. In holding that this did not relieve the municipality of the indebtedness and the possibility of having to pay it, the court, in the case of *Rorick v. Dalles City* (Ore.), 12 Pac. (2d) 762, said: "This is a

suit by plaintiff, a taxpayer, to enjoin the defendant, Dalles City, a municipal corporation, from issuing and selling bridge bonds aggregating the sum of \$650,000, the proceeds of which are to be used in construction of a tollbridge over and across the Columbia River. The proposed bonds are to be issued pursuant to chapter 173, p. 239, Laws 1931, and their issuance and sale have been authorized by a majority of the legal voters of the city at an election held pursuant to that act. The ground alleged in the complaint for injunctive relief is that, by their issuance and sale, the city will create a bonded indebtedness in excess of the amount allowed by law. * * * The limitation there imposed is so important and essential for the protection of the taxpaying public that, if it is to be done away with at all, it ought to be by the express language of some statute and not by doubtful implication. Furthermore, the last clause of section 10 indicates a legislative intent that the exercise of the power granted should be subject to debt limitations. The contention of the city that no indebtedness will be created against it within the meaning of section 56-2301 by the issuance and sale of these bonds is also we think untenable. The bonds themselves, after providing that they are not obligations of Dalles City and are payable only from the tolls and revenues of the bridge, expressly state: ' * * * In case, however, such tolls and revenues should be insufficient to pay operating cost, repairs, maintenance, and interest, Dalles City undertakes and promises to pay any deficits in interest.' * * * The statute makes no mention of contingent liabilities. The prohibition of the statute is that no city shall issue and have outstanding at any one time bonds in excess of ten per cent of the assessed valuation of the property within the city, after excluding certain moneys and bonds therein enumerated. These bonds are not within the exemption therein made, and hence, in so far as they obligate the city for the payment of money, they must be included in determining whether their issuance and sale will exceed the bonded debt limitation of the statute. * * * Under such a rate and running for fifteen years, the liability under the bonds will exceed the bonded debt limitation of the statute. * * * What, if any, amount the bridge may earn over and above the cost of operation and maintenance is wholly incapable of ascertainment. Hence, there is no way of determining whether these bonds will ever be paid. If from any cause the bridge should be destroyed or its earning should be insufficient to pay both principal and interest, the obligation of the city will continue until, from general taxation or from some other source,

the city may be compelled to pay off the principal in order to get rid of the duty of paying the interest. To hold that a municipality may avoid its debt limitation by a device of this nature, where the obligation to pay interest charges exceeds the limitation and may continue forever, would defeat the very purpose of the statute and deprive taxpayers of every safeguard for which the law was designed."

§ 92. **Distribution of cost of municipal public utilities.**—The cost of securing the advantages of municipal public utilities, in addition to providing other permanent public improvements in the way of public buildings, paved streets, parks and boulevards, is naturally so great as to make it practically impossible for the generation providing them to meet the entire expense of doing so; and as these conveniences will remain available for the enjoyment of future generations as well as the one that provides them, it is only equitable that the expense necessarily incurred in securing such advantages to the particular municipality should be divided and a part of the amount remain for the coming generations to pay in the form of a bond issue extending over varying periods. Many ingenious devices have been resorted to by different municipal corporations in their attempt to evade the constitutional limitation of indebtedness in order to provide in some practicable way for the securing of these conveniences presently and for their payment in the future.

The court of Michigan furnishes one of the best illustrations of the division or distribution of the cost of acquiring and operating municipal public utilities, because after the limit of its indebtedness, permitted by the constitution, has been reached, the municipality may issue bonds against the plant of the utility itself, if necessary, to the extent of its value and its earning capacity as additional security for the payment of the debt incurred in acquiring the plant. In holding legislation unconstitutional which attempted to place a further limitation on the power of the municipality in acquiring and operating public utilities for itself and its inhabitants, the court reasoned as follows in the case of *Michigan United Light & Power Co. v. Hart*, 235 Mich. 682, 209 N. W. 937: "The village of Hart is incorporated under the provisions of Act, 3 P. A. 1895 (chapter 72, vol. 1, C. 1, 1915). It proposes to erect a hydro-electric plant outside of the incorporated limits of the village to supply electric current and power to its inhabitants. By a proper vote of the taxpayers it has been legally authorized to acquire, own, and operate such a plant.

* * * The question involved is: To what extent is a village

authorized to issue mortgage bonds beyond the general limit of its bonded indebtedness prescribed by the legislature, for the purpose of financing a public utility. * * * It will be noted that this constitutional clause places no limit on the amount of mortgage bonds which the village may issue against the utility. It was not necessary to do so because the limit is fixed by its value as security for the bonds. It does not authorize the issue of bonds to be paid by taxation, except within the general limit of the bonded indebtedness, as fixed by the legislature. If necessary to go beyond the limit so fixed, authority is given to issue bonds secured by a mortgage on the utility and its revenues, providing no liability is imposed on the village. Plainly, it was the purpose of this constitutional provision to empower a village to mortgage the utility to the extent of its value as security for the debt. While the legislature has the power to fix a maximum rate of taxation for municipal purposes, and to restrict the right of the village to borrow money and contract debts, such power must be exercised subject to applicable provisions of the constitution. It can not limit the power granted by the constitution or deprive the village of its benefits. Because it undertakes to do this, the legislative enactment relied on by the plaintiff is unconstitutional."

While the cost of municipal public utilities which is met with money raised by taxation may be imposed on all the inhabitants of the municipality, the public utility service need not be extended, because of that fact, to everyone residing within the city limits, as is indicated by the court in the case of *State v. Johnson* (Mo.), 50 S. W. (2d) 121: "The aggregate of the limitations of indebtedness fixed by sections 12 and 12a of article 10 of the Constitution is and was at the time of the city election in question fifteen per cent, and as the record before us does not disclose the existence of any other city indebtedness, it is apparent that the \$75,000 bond issue does not exceed the constitutional limits. * * * The fact that the waterworks system was not extended to every part of the city would not make the tax levy void as to lots not served."

§ 93. Indebtedness defined and distinguished.—The limitation of municipal indebtedness, however, was created by the very necessity of the situation and is maintained by most of the courts in its full force and effect, although in many cases the providing of public utilities is permitted in the face of the limitation of indebtedness because it is a necessary current expense, and a contract for such service running through a num-

ber of years is generally upheld although the aggregate amount to be paid under the contract may exceed the debt limit. In addition to this being a rule of necessity it is a practical business principle, providing the current revenue of any particular year is sufficient to pay for the municipal public utilities for that period. Aside, however, from this sort of an exception to the general rule, the purpose of restricting the expenditure of the municipality by the imposition of a constitutional debt limit is maintained by requiring that the municipality pay cash on reaching the limit fixed by the constitution.

On the theory that municipal public utilities may become assets and produce profits for the municipality, the court permits the municipality to own and operate such and holds that the expense of doing so does not constitute a municipal indebtedness under the constitution, in the case of *State v. Short*, 113 Okla. 187, 240 Pac. 700, for as the court said: "Under the stipulation of facts submitted, the determinative question of law is whether debts, incurred by the city under section 27, art. 10, of the Constitution, for 'public utilities' must be included with, and added to, the debts incurred under sections 2, 3, and 20, Id., for 'governmental expenses,' in estimating whether the city has exceeded the 5 per cent debt limit fixed by section 26, art. 10, of the Constitution. * * * This section is not only an express grant of authority to become indebted for public utilities to be owned exclusively by an incorporated city or town; but it expressly excepts the exercise of such authority from the limitations prescribed in section 26, Id. The words, 'may be allowed to become indebted in a larger amount than that specified in section 26,' are expressive and clear. There is an obvious distinction between the purposes of the two sections—one is a limitation upon legislative power to incur debts for ordinary governmental purposes, while the other is a grant of power to incur debts for 'utilities' to be owned exclusively by incorporated cities or towns. * * * But section 27 is an express and independent grant of power for distinctly different purposes, and is based upon a different economic principle than that upon which section 26 is based. It authorizes debts to be incurred for public utilities upon the theory that such utilities may become assets of the city or town against its liabilities, and may possibly become a source of saving or profit to such city or town. This grant of authority is extended only to incorporated cities and towns, and in said section expressly freed from the limitation prescribed in section 26."

By way of illustration and further definition of the term "indebtedness" within the meaning of the constitution, the cases cited below are in point.¹

¹ United States. Walla Walla, Washington v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77.

Federal. Keihl v. South Bend, Indiana, 76 Fed. 921, 36 L. R. A. 228; Defiance Water Co. v. Defiance, Ohio, 90 Fed. 753; Cunningham v. Cleveland, Tennessee, 98 Fed. 657; Anoka Water Works &c. Co. v. Anoka, Minnesota, 109 Fed. 580; Fidelity Trust &c. Co. v. Fowler Water Co., 113 Fed. 560; Ottumwa, Iowa v. City Water Supply Co., 119 Fed. 315, 59 L. R. A. 604; Wheeler v. Denver, Colorado, 231 Fed. 8; Franklin Trust Co. v. Loveland, Colorado, 3 Fed. (2d) 114; Oshkosh, Nebraska v. Fairbanks, Morse & Co., 8 Fed. (2d) 329; St. Louis-San Francisco R. Co. v. Moore, 25 Fed. (2d) 964; Tomich v. Union Trust Co., 31 Fed. (2d) 515; Karel v. Eldorado, Illinois, 32 Fed. (2d) 795; Harris Trust &c. Bank v. Chicago R. Co., 39 Fed. (2d) 958; Jerseyville, Illinois v. Connett, 49 Fed. (2d) 246; Lumbermens Trust Co. v. Ryegate, Montana, 50 Fed. (2d) 219; Judith Basin Land Co. v. Ferguson County, Montana, 50 Fed. (2d) 792; Campbell, Missouri v. Arkansas-Missouri Power Co., 55 Fed. (2d) 560.

Alabama. Capital City Water Co. v. Montgomery, 92 Ala. 366, 9 So. 343; Culpepper v. Phenix City, 216 Ala. 318, 113 So. 56.

Arizona. Buntman v. Phoenix, 32 Ariz. 18, 255 Pac. 490; Ramirez v. Electrical Dist. No. 4 (Ariz.), 294 Pac. 614.

Arkansas. Bank of Commerce v. Huddleston, 172 Ark. 999, 291 S. W. 422; El Dorado v. Jacobs, 174 Ark. 98, 294 S. W. 411; Shull v. Texarkana, 176 Ark. 162, 2 S. W. (2d) 18; Mississippi Valley Power Co. v. Board of Improvement of Waterworks Dist. No. 1 (Ark.), 46 S. W. (2d) 32.

California. McBean v. Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. 191; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Jardine v. Pasadena, 199 Cal. 64, 248 Pac. 225; Uhl v. Badaracco, 199 Cal. 270, 248 Pac. 917; Mahoney v. San Francisco, 201 Cal. 248, 257 Pac. 49; Pasadena v. McAllaster, 204 Cal. 267, 267 Pac. 873; Newton v. Brodie (Cal.), 290 Pac. 1059; Garrett v. Swanton (Cal. App.), 3 Pac. (2d) 1025; Security Trust &c. Bank v. Los Angeles (Cal. App.), 7 Pac. (2d) 1061; Metropolitan Water Dist. v. Burney (Cal.), 11 Pac. (2d) 1095.

Colorado. Donahue v. Morgan, 24 Colo. 389, 50 Pac. 1038; Shields v. Loveland, 74 Colo. 27, 218 Pac. 913; Newton v. Ft. Collins, 78 Colo. 380, 241 Pac. 1114; Searle v. Haxtun, 84 Colo. 494, 271 Pac. 629.

Florida. Peterson v. Davenport, 90 Fla. 71, 105 So. 265; West v. Lake Placid, 97 Fla. 127, 120 So. 361.

Georgia. Grace v. Hawkinsville, 101 Ga. 553, 28 S. E. 1021; Dawson v. Dawson Waterworks Co., 106 Ga. 696, 32 S. E. 907; Augusta v. Thomas, 159 Ga. 435, 126 S. E. 144; Byars v. Griffin, 168 Ga. 41, 147 S. E. 66; Morton v. Waycross (Ga.), 160 S. E. 330.

Idaho. Miller v. Buhl, 48 Idaho 668, 284 Pac. 843.

Illinois. Prince v. Quincy, 105 Ill. 138, 44 Am. Rep. 785, affd. in 105 Ill. 215; Dutton v. Aurora, 114 Ill. 138, 28 N. E. 461; Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781; Prince v. Quincy, 128 Ill. 443, 21 N. E. 768, affd. in 28 Ill. App. 490; Danville v. Danville Water Co., 180 Ill. 235, 54 N. E. 224; Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861; East Moline v. Pope, 224 Ill. 386, 79 N. E. 587; Lobdell v. Chicago, 227 Ill. 218, 81 N. E. 354; Schnell v. Rock Island, 232 Ill. 89, 83 N. E. 462, 14 L. R. A.

(N. S.) 874; *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723; *People v. Chicago &c. R. Co.*, 253 Ill. 191, 97 N. E. 310; *Leonard v. Metropolis*, 278 Ill. 287, 115 N. E. 813; *Maffit v. Decatur*, 322 Ill. 82, 152 N. E. 602; *Ward v. Chicago*, 342 Ill. 167, 173 N. E. 810.

Indiana. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *Voss v. Watervloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201, 2 Ann. Cas. 978; *Fox v. Bicknell*, 193 Ind. 537, 141 N. E. 222.

Iowa. *Grant v. Davenport*, 36 Iowa 396; *Burlington Water Co. v. Woodward*, 49 Iowa 58; *Davis v. Des Moines*, 71 Iowa 500, 32 N. W. 470; *Creston Water Works Co. v. Creston*, 101 Iowa 687, 70 N. W. 739; *Windsor v. Des Moines*, 110 Iowa 175, 81 N. W. 476, 80 Am. St. 280; *Swanson v. Ottumwa*, 118 Iowa 161, 91 N. W. 1048, 59 L. R. A. 620; *Muscatine Lighting Co. v. Muscatine*, 205 Iowa 82, 217 N. W. 468; *Johnston v. Stuart (Iowa)*, 226 N. W. 164; *Van Eaton v. Sidney (Iowa)*, 231 N. W. 475, P. U. R. 1930E, 103; *Mote v. Carlisle (Iowa)*, 233 N. W. 695; *Christensen v. Kimballton (Iowa)*, 236 N. W. 406.

Kansas. *Keplinger v. Kansas City*, 122 Kans. 158, 251 Pac. 413; *State v. McCombs*, 129 Kans. 834, 284 Pac. 618.

Kentucky. *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433; *First Nat. Bank v. Jackson*, 199 Ky. 94, 250 S. W. 795; *Covington v. O. F. Moore Co.*, 218 Ky. 102, 290 S. W. 1066; *Cahill-Swift Mfg. Co. v. Bardwell*, 219 Ky. 649, 294 S. W. 171; *Hurst v. Millersburg*, 220 Ky. 108, 294 S. W. 738; *Wilson v. Covington*, 220 Ky. 798, 295 S. W. 1068; *Bowling Green v. Kirby*, 220 Ky. 839, 295 S. W. 1004; *Klein v. Louisville*, 224 Ky. 624, 6 S. W. (2d) 1104; *Jones v. Rutherford*, 225 Ky. 773, 10 S. W. (2d) 296; *Jones v. Corbin*, 227 Ky. 674, 13 S. W. (2d) 1013; *Sturgis v. Christenson Bros.*, 235 Ky. 346, 31

S. W. (2d) 386; *Owensboro Waterworks Co. v. Owensboro*, 29 Ky. L. 1118, 96 S. W. 867.

Louisiana. *Gislard v. Donaldsonville*, 159 La. 738, 106 So. 287; *Middleton v. Police Jury*, 169 La. 458, 125 So. 447; *McCann v. Morgan City*, 173 La. 1063, 139 So. 481; *Farmerville v. Commercial Credit Co. (La.)*, 186 So. 82; *Peoples Gas &c. Co. v. Ruston (La.)*, 141 So. 36. **Maine.** *Reynolds v. Waterville*, 92 Maine 292, 42 Atl. 553; *Kennebec Water Dist. v. Waterville*, 96 Maine 234, 52 Atl. 774.

Massachusetts. *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *Browne v. Boston*, 179 Mass. 321, 60 N. E. 934.

Michigan. *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Michigan United Light &c. Co. v. Hart*, 235 Mich. 682, 209 N. W. 937.

Minnesota. *Woodbridge v. Duluth*, 57 Minn. 256, 59 N. W. 296; *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

Missouri. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Lamar Water &c. Co. v. Lamar*, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157, affd. in 140 Mo. 145, 39 S. W. 768; *State v. Curtis*, 319 Mo. 316, 4 S. W. (2d) 467; *Dysart v. St. Louis*, 321 Mo. 514, 11 S. W. (2d) 1045; *Ennis v. Kansas City*, 321 Mo. 536, 11 S. W. (2d) 1054; *Meyer v. Kansas City*, 323 Mo. 200, 18 S. W. (2d) 900; *Bell v. Fayette (Mo.)*, 28 S. W. (2d) 356; *Hight v. Harrisonville (Mo.)*, 41 S. W. (2d) 155; *State v. Johnson (Mo.)*, 50 S. W. (2d) 121.

Montana. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209; *Edwards v. Helena*, 58 Mont. 292, 191 Pac. 387; *First Nat. Bank v. Dawson County*, 74 Mont. 439, 240 Pac. 981; *Edmunds v. Glasgow*, 89 Mont. 596, 300 Pac. 203.

Nebraska. *State v. Crete*, 32 Nebr. 568, 49 N. W. 272; *Futscher v. Rulo*, 107 Nebr. 521, 186 N. W. 536.

New Jersey. *Hamilton Township*

v. Mercer County Trac. Co., 88 N. J. L. 485, 97 Atl. 61.

New Mexico. Palmer v. Albuquerque, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106; State v. State Tax Comm., 34 N. Mex. 303, 280 Pac. 258.

New York. Port Jervis Waterworks Co. v. Port Jervis, 151 N. Y. 111, 45 N. E. 388; In re Plattsburgh, 157 N. Y. 84, 51 N. E. 512; Levy v. McClellan, 196 N. Y. 178, 89 N. E. 569.

North Carolina. Mewborn v. Kingston, 199 N. Car. 72, 154 S. E. 76; Bolich v. Winston-Salem (N. Car.), 164 S. E. 361.

North Dakota. Logan v. Bismarck, 49 N. Dak. 1178, 194 N. W. 908, P. U. R. 1923B, 450.

Ohio. Cincinnati v. Harth, 101 Ohio St. 344, 128 N. E. 263, 13 A. L. R. 308.

Oklahoma. State v. Short, 113 Okla. 187, 240 Pac. 700; Pawhuska v. Pawhuska Oil & Co., 118 Okla. 201, 248 Pac. 336; Lowery v. Water Improvement Dist. Cos., 122 Okla. 116, 251 Pac. 748; St. Louis-San Francisco R. Co. v. Andrews, 137 Okla. 222, 278 Pac. 617; Perrine v. Bonaparte, 140 Okla. 165, 282 Pac. 332; In re Murray, 140 Okla. 240, 285 Pac. 80; St. Louis-San Francisco R. Co. v. County Excise Board, 142 Okla. 176, 286 Pac. 345; Ruth v. Oklahoma City, 143 Okla. 266, 287 Pac. 406; Tecumseh v. Butler (Okla.), 298 Pac. 256; Jones v. Blaine (Okla.), 300 Pac. 369; Alva v. Mason (Okla.), 300 Pac. 784.

Oregon. Butler v. Ashland, 113 Ore. 174, 232 Pac. 655.

Rhode Island. Peabody v. West-erly Waterworks, 20 R. I. 176, 37 Atl. 807.

South Carolina. Luther v. Wheeler, 73 S. Car. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, 6 Ann. Cas. 764; Sullivan v. Charleston, 133 S. Car. 156, 130 S. E. 872; Sullivan v. Charleston, 133 S. Car. 189, 133 S. E. 340; Briggs v. Greenville County, 137 S. Car. 288, 135 S. E. 153; McDaniel v. Bristol, 160 S. Car. 408, 158 S. E. 804.

South Dakota. Travaille v. Sioux Falls (S. Dak.), 240 N. W. 336.

Tennessee. Bank of Commerce & Co. v. Memphis, 155 Tenn. 63, 290 S. W. 990; Bristol v. Bank of Bristol, 159 Tenn. 647, 21 S. W. (2d) 620.

Texas. Nalle v. Austin, 85 Tex. 520, 22 S. W. 668; Vernon v. Montgomery (Tex.), 265 S. W. 188; Texas Elec. & Co. v. Vernon (Tex.), 265 S. W. 176; Andrus v. Crystal City (Tex.), 265 S. W. 550; Texas Elec. & Co. v. Vernon (Tex.), 266 S. W. 600; Amarillo Oil Co. v. Ranch Creek Oil & Co. (Tex.), 271 S. W. 145; Belton v. Harris Trust & Co. Bank (Tex.), 273 S. W. 914; Griffith v. Sowell (Tex.), 287 S. W. 673; Cameron v. Waco (Tex.), 8 S. W. (2d) 249; Keel v. Pulte (Tex. Com. App.), 10 S. W. (2d) 694; State v. Stickle (Tex. Civ. App.), 11 S. W. (2d) 837; McKeazie Constr. Co. v. San Antonio (Tex. Civ. App.), 50 S. W. (2d) 349.

Utah. Logan City v. Public Utilities Comm., 72 Utah 536, 271 Pac. 961, P. U. R. 1929A, 378; Barnes v. Lehi City, 74 Utah 321, 279 Pac. 878.

Virginia. Kirkpatrick v. Board of Supervisors, 146 Va. 113, 136 S. E. 186.

Washington. Metcalf v. Seattle, 1 Wash. 297, 25 Pac. 1010; Austin v. Seattle, 2 Wash. 667, 27 Pac. 557; Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059; Winston v. Spokane, 12 Wash. 524, 41 Pac. 888; Faulkner v. Seattle, 19 Wash. 320, 53 Pac. 365; State v. Clausen, 40 Wash. 95, 82 Pac. 187; Dean v. Walla Walla, 48 Wash. 75, 92 Pac. 895; Griffin v. Tacoma, 49 Wash. 524, 95 Pac. 1107; Scott v. Tacoma, 81 Wash. 178, 142 Pac. 467; Seymour v. Ellensburg, 81 Wash. 365, 142 Pac. 875; Schooley v. Chehalis, 84 Wash. 667, 147 Pac. 410; Uhler v. Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998; Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239; Twichell v. Seattle, 106 Wash. 32, 179 Pac. 127; Friese v. Edmonds, 158 Wash. 316, 290 Pac. 856.

West Virginia. Allison v. Chester, 69 W. Va. 533, 72 S. E. 472, 37 L.

§ 94. **Expense of plant and of necessary service distinguished.**—In the case of *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201, 2 Ann. Cas. 978, decided in 1904, where the action was for an injunction to prevent the purchase of stock in a waterworks company or the erection of waterworks by the town of Waterloo itself because in doing so the town would exceed its debt limit, the court makes a clear distinction between the expense of providing water and light for public purposes, which is generally regarded as a necessary expense, and the ownership and operation of a plant for the purpose of providing water and light, which expense is regarded as extraordinary in the sense that the municipality will not be permitted to exceed the debt limit in procuring it, the court saying: "While the expense of water and light for public use in a town or city is an ordinary and necessary expense, the construction of a waterworks or electric light plant by such town or city is not in any sense an ordinary and necessary expense, but an extraordinary one. There is a clear and plain distinction between a contract for water and light for public use and one for the construction of a water and light plant to furnish the same. The first is an ordinary and necessary expense, while the latter involves municipal ownership of the water and light plant, the means of furnishing said water and light, and is an extraordinary expense. It has been correctly held that municipal corporations can not evade restrictions upon their power to become indebted by issuing their bonds, payable only out of a fund raised by a special tax authorized, levied, and collected for that purpose (providing the same are not for special benefits, etc.), or payable only out of the rentals or income of a water or light plant or other property owned by such municipal corporation, or by buying property subject to liens, although they do not assume or agree, in terms, to pay said liens, or by providing that such liens shall be paid only out of a special fund raised by taxation for that purpose, or only out of the income of such property."

While a municipality may acquire its own lighting plant, un-

R. A. (N. S.) 1042, Ann. Cas. 1913B, 1174.

Wisconsin. *Perrigo v. Milwaukee*, 92 Wis. 236, 65 N. W. 1025; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. 885; *Milwaukee v. Milwaukee County*, 95 Wis. 424, 69 N. W. 819; *Stedman v. Berlin*, 97 Wis.

505, 73 N. W. 57; *Burnham v. Milwaukee*, 98 Wis. 128, 73 N. W. 1018; *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1113; *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639; *Janes v. Racine*, 155 Wis. 1, 143 N. W. 707; *State v. Portage*, 174 Wis. 588, 184 N. W. 376.

less it exceeds its debt limit in doing so, a private plant holding a franchise with the municipality and a contract for street lighting may not complain because the franchise was not exclusive. Where, however, the action of the municipality is illegal because it resulted in exceeding its legal indebtedness, the courts will prevent such action by the municipality at the instance of the private company, for as the court said in the case of *Campbell, Missouri v. Arkansas-Missouri Power Co.*, 55 Fed. (2d) 560: "It is urged that, inasmuch as the plaintiff's franchise was not an exclusive one, it had no right to maintain this suit for injunctive relief. The plaintiff, however, had a franchise under which it was entitled to maintain and operate its lighting system in the city of Campbell, and it also had a contract with the city for street lighting. The fact alone that the plaintiff had this franchise would, of course, not prevent the city from erecting and maintaining a municipal light plant, if, in doing so, it did not exceed its power and authority. As the owner of this franchise, however, the plaintiff was entitled to relief against the illegal acts of others who might assume to exercise the privilege conferred upon it by its franchise. A franchise is property, and, as such, is under the protection of the law, and without express words it is exclusive as against all persons acting without legal sanction. * * * The Supreme Court of Missouri held that, within the meaning of the Missouri constitution, this form of contract created a debt. The construction of the Missouri constitution by the Missouri Supreme Court will, of course, be followed by this court. There is, however, further reason for holding that this contract resulted in creating a debt. The machinery sold to the city, as has been pointed out, does not constitute the entire plant which generates and distributes the electric current and produces the revenue for such service. It required in addition to this machinery the equipment and the power house owned by the city. The purchase-price, under the provisions of this contract, is not to come alone from the earnings of the property sold. Under such circumstances, the obligation to pay the income of the property other than that purchased is not different from an obligation to pay from any other funds."

§ 95. **Instalment payment purchase.**—In the case of *Reynolds v. Waterville*, 92 Maine 292, 42 Atl. 553, decided in 1898, the Supreme Court of Maine refused to permit the defendant city to acquire a public utility, when to do so would exceed the debt limit, by paying for the same in instalments under a sort of a rental agreement which the court held to be an attempt to

evade the limitation fixed by the constitution, the court saying: "The constitution of this state provides that no city or town shall create any debt or liability which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town. * * * It would not be a misinterpretation to say that the city of Waterville, instead of leasing the property, undertakes to purchase or pay for it on the instalment plan, and that what are called rentals for the hall are merely partial payments on its cost. * * * It must be confessed that the act in question is a very dexterous attempt to accomplish one thing under the name of another thing—as plausible as it is fallacious. * * * It is sure, however, if the plan here, intended, as it is, to avoid, rather than uphold, the law, shall prevail, the result as a precedent will shatter the constitutional amendment into pieces."

Under a lease with an option to purchase the equipment necessary for providing itself and its inhabitants with water, the court of Washington held that the liability was limited to the nominal monthly payment and was not for the entire amount of the equipment, so that the contract was properly let although competitive bids were not taken. This principle was established and clearly expressed in the case of *Friese v. Edmonds*, 158 Wash. 316, 290 Pac. 856, as follows: "The question then is, is the city now obligating itself and, in legal effect, expending in round numbers \$10,000, or, is it by means of this contract obligating itself only to pay \$163 on the tenth day of the month following the furnishing to it, by respondent Pump Equipment Company, of water as specified in the contract? * * * That the city must operate the pumps at its own expense, if water is produced, is nothing more than that which devolves upon all lessees and tenants, and that it must build pump houses, etc., is the equivalent of the common practice of permitting a tenant to improve leased property for his own advantage and enjoyment. * * * All of the other provisions of the lease, as we have seen, clearly indicate that the city is receiving at the present time nothing but the bare right to take the water if, and when, it is produced upon payment of the monthly charge. Must we then assume that the last provision overrides all that precedes it? No authority is cited which so holds, and we think it would be arbitrary, indeed, to so decide. There is no law which compels a vendor, against his will, to demand and accept no less than the full value of his property and one, being solvent, may give away his property if he desires even to a municipal corporation.

* * * If we are right upon the question already discussed, then there was here no need to call for competitive bids under Rem. Comp. Stat., section 9145, because the city's liability at any one time can not exceed the monthly rental of \$163."

Although payable in instalments, the entire amount due for a public utility is taken in fixing the amount of municipal indebtedness in determining the amount available by virtue of the constitutional limitations on the subject. This is in line with the prevailing rule and the better reason, for as the court said in the case of *Byars v. Griffin*, 168 Ga. 41, 147 S. E. 66: "Many of the provisions of the contract look to the security of the parties and to the security of the bondholders, but they do not alter the primary purpose of the parties that the city should ultimately become owner of the property. In these circumstances the obligations of the city to the company amounted in substance to a debt within the meaning of the clause of the constitution quoted in the first syllabus. If it be said that the city was not obliged to take the property, or, taking the property, it was not to be paid for by taxation, that would not alter the case. The city wanted the property, and would advance from the city treasury \$100,000 of the amount necessary to obtain it, and would employ the city's distributing plant and operate the joint enterprise to pay the balance in the future. If the city should not perform its obligations, and should fail to make the payments as specified in the contract, it would not get the property. This would result in defeat of the city's policy to own its water system, and entail other losses. The effect of the transaction was to constitute the city's obligation to make the future payments—by whatever name called—in substance a debt within the meaning of the constitution. The constitutional limitation upon municipal power to create debts can not be circumvented by a plan to acquire a water system by expenditure of a large amount of available funds in the treasury and by making promises to pay the balance of the cost in future years, either from the treasury or from profits to be derived from operation of the business. It has been held in effect by this court that anticipated profits of the character mentioned can not be the basis for incurring an obligation without creating a debt."

In purchasing an electric light plant, to be paid for through a series of years, the court found that the city created a debt within the meaning of the constitution, and as no provision was made for its payment, the entire transaction was void, because it violated the constitutional provision on the subject of mu-

municipal indebtedness, for as the court said in the case of *Andrus v. Crystal City (Tex.)*, 265 S. W. 550: "In the sale of the light plant and land to the city it was arranged that part of the consideration to be paid therefor was to mature and be paid during the fiscal year, 1921, part during 1922, and the balance during 1923. It was not contemplated that the obligation created by this purchase and sale was to be discharged by payment from the revenues of the current year 1921, but it was clearly understood that part only of the consideration was to be paid during said current year, and the balance during the next two years following. This was clearly attempting to create a debt within the meaning of the constitution, and, as no provision was made to assess and collect a tax sufficient to pay the interest and provide a sinking fund for the payment thereof, the transaction was void. No purchase authorized by a statute could be valid which violated the express provisions of the constitution."

This same court in a later case denied the right of a municipality to create a debt payable, in whole or part, through a series of years or to anticipate its current revenues of such years as a means of paying or pledging its revenue for such a purpose. In refusing to imply authority, the court spoke as follows in the case of *Griffith v. Sowell (Tex.)*, 287 S. W. 673: "The water plant placed in its hands was the property of the city and the revenues arising from the operation thereof were required to be deposited with the city treasurer, as the funds of the city. It derived all its power over such funds from said provisions of the charter, and, in determining the extent of such power, we think such provisions should be strictly construed. The machinery purchased by said contract was for the purpose of replacing a worn-out unit of said water plant, and we may further concede that such replacement was necessary in order to properly maintain said plant, which the charter required the board to do. * * * Nothing contained in said provisions can be construed to confer express authority to create a debt payable in whole or in part, in a succeeding year or years, or to anticipate the current revenues of such year or years as a means of discharging the same or to pledge such revenues for such purpose. No such authority is necessarily implied from the duty imposed and the power given to maintain the plant. * * * Since we hold that the board of water commissioners which attempted to make such provision had neither express nor implied power to do so, it follows that no lawful provision for such payment has been made."

Nor will the municipality be permitted to divert funds held for the payment of certain improvement bonds for the purchase of engines and other equipment for its lighting plant, for, as the court said, a municipality may not greatly anticipate its current revenue and borrow money for its future use. Such is the effect of the decision in the case of *Texas Electric & Ice Co. v. Vernon (Tex.)*, 266 S. W. 600: "The transfer of the water and sewer bonds and permanent improvement bonds for the purpose of paying for these engines was a distinct diversion of such funds from the purposes for which they had been created.

* * * In this case it appears that the city proceeded upon the theory that all means of realizing money were permissible, and in their effort to realize funds to construct their light plant appropriated these bonds which were a charge upon other and distinct funds and for a purpose absolutely foreign to that to which they were so applied. A reckless disregard of the law's limitations will not be condoned by the courts. * * * Taking the revenues from the waterworks and sewer plant and the current revenues of the city we have the aggregate of the sum of \$44,389.63. The four bonds, each for \$10,000, were payable in 30 days and amount to \$40,000, and the current expenses amount to \$17,400, altogether aggregating \$57,400. This clearly exceeds all probable city revenues, even if we include its waterworks revenues. The city is allowed to reasonably anticipate its general revenues to pay its existing debts, but, where it appears that such revenue has been largely exceeded for the purpose of borrowing money for future use, such transactions are prohibited."

Where the municipality has assumed the payment of the entire purchase-price for machinery to be installed in its plant, a municipal indebtedness is created which can not be avoided by providing for its payment by instalments. So long as the municipality is liable for the debt it is a municipal debt, for as the court said in the case of *Jones v. Rutherford*, 225 Ky. 773, 10 S. W. (2d) 296: "It is clear that under the proposed contract the city assumes an obligation to pay the entire contract price of the machinery. This obligation constitutes a present indebtedness within the meaning of section 157 of the Constitution, and in an amount forbidden by that section. Being a present indebtedness, the effect of the constitutional provision can not be avoided, by providing for instalment payments running through a series of years. *Bradford v. Fiscal Court of Bracken County*, 159 Ky. 552, 167 S. W. 937. It is urged, however, that

the light and water plant is a private enterprise operated by the city, and that the city has by ordinance set apart sufficient revenues to be derived from the water and light fund to meet the instalments as they fall due, and that therefore this obligation is not a debt within the meaning of section 157, *supra*. But, if the city is primarily liable on the contract, this vice is not cured by the mode of payment, and it is immaterial whether it is paid out of revenues derived from an enterprise owned and controlled entirely by the city and which it is bound to maintain, or from revenues derived from other sources. The city assumes this indebtedness."

This same court, in an earlier case in holding that a municipality could not issue bonds or contract a debt in excess of its current revenue without the consent of the qualified voters, decided that bonds issued without such consent were not obligations of the municipality and that no tax could be levied for their payment. As the ordinance expressly provided that the bonds were payable only out of revenue realized from the operation of the plant, no municipal indebtedness was created within the meaning of the constitution, for as the court well expressed it in the case of *Bowling Green v. Kirby*, 220 Ky. 839, 295 S. W. 1004: "It is admitted at the outset that a municipality can not issue bonds or contract a debt in excess of the income and revenue provided for the year in which the debt is created without the assent of the qualified voters thereof at an election to be held for that purpose. * * * If the bonds are issued they are not the obligations of the municipality as a corporate entity. No tax can be levied to pay either the bonds or the interest thereon. The ordinance carefully provides that the bonds and the interest must be paid out of the income from the operation of the waterworks plant. If the debt can not be discharged in that manner, then it can not be discharged at all so far as the municipality in its corporate capacity is concerned. There is no power given to impose a tax on the property within the city to discharge the obligations. If the city can not be compelled to pay the debt it is not an indebtedness falling within the provisions of either section 157 or section 158 of the constitution. * * * We have no difficulty in reaching the conclusion that the bonds which it is proposed to issue are not debts within the meaning of the constitution, if they are to be paid out of the income and revenue derived from the operation of the waterworks plant. If the waterworks system could be taken to discharge the debts, then the bonds would probably cre-

ate a prohibited indebtedness. * * * In the event there should be default in the payment of interest or principal of the bonds which are to be issued, the mortgagee would have no remedy except to look to the income from the waterworks system. He could compel the imposition of a reasonable water rate, but the rate could not be made unreasonably exorbitant. He could cause the property to be placed in the hands of a receiver and operated for his benefit until his debt is satisfied. He can not enforce his lien and sell the waterworks system."

The payment for equipment for municipal public utilities in instalments by the municipality does not avoid creating a debt for the amount in violation of the constitutional provisions, unless the municipality had already levied a tax to meet the payment of the debt before making the contract, as is indicated in the case of *Morton v. Waycross* (Ga.), 160 S. E. 330, where the court said: "'A court of equity will not interfere with the discretionary action of the governing officers of a city within the sphere of their legally delegated powers, unless such action is arbitrary, and amounts to an abuse of discretion.' Mayor, etc., of *Gainesville v. Dunlap*, 147 Ga. 344 (6), 94 S. E. 247; *City of Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; *South Georgia Power Co. v. Baumann*, 169 Ga. 649, 652, 151 S. E. 513; *Danielly v. Cabaniss*, 52 Ga. 211 (4); *McMaster v. Waynesboro*, 122 Ga. 231 (5), 50 S. E. 122. If the effect of the proposed contract was not to create a new debt, contrary to the provisions of the constitution of this state, the making of the contract would not be an abuse of discretion by the municipal authorities. * * * The fact that the amount was payable at intervals by the city giving monthly credits upon the franchise taxes due by the company, for 50 per cent. of the 'savings' by the city, earned by use of the equipment, would not prevent its character as a debt, *Byars v. City of Griffin*, supra; *Tate v. Elberton*, 136 Ga. 301 (4), 71 S. E. 420. The case differs from *Mayor, etc., of Rome v. McWilliams*, 67 Ga. 106, in which the city levied a tax to pay the cost of the improvement before making the contract."

§ 96. **Purchase of encumbered property.**—In the case of *Browne v. Boston*, 179 Mass. 321, 60 N. E. 934, decided in 1901, the Supreme Court of Massachusetts refused to find power in the city of Boston to purchase certain land subject to large encumbrances for the payment of which it was expressly provided in the agreement the city should not be liable. The court looking at the substance of the agreement and disregarding its form

found that the city was actually liable for the entire price including the encumbrance because the property would be taken from the city to satisfy such encumbrance if it remained unpaid. The court in the course of its decision spoke as follows: "That board made an arrangement with the owners of the land 'by which the city of Boston agreed to buy in the manner herein-after described, and the owners to sell, said parcels for the following prices.' Then follows a statement of the price per foot of each of the different parcels, amounting in all to \$226,000. It was arranged with the owners of the land that they should mortgage the same to third parties for \$202,000, payable, with interest, after three years from the conveyance to the city, with a privilege reserved in the mortgages to the owners, their grantees and assigns, to pay the mortgages and interest at maturity, or earlier if they should so desire. These mortgages were to be placed on the land before it was conveyed to the city, and it was arranged that the land should be conveyed subject to them, but that the city should not be mentioned in them, and that the deeds should contain the statement that the city was not to be held liable in any way for the payment of the mortgages, or the interest thereon. * * * It is true that no action could be maintained against the city for the balance of the purchase-price, and that in that sense the city would not be indebted for such balance. But the property, when conveyed, will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them, or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers will ultimately be obliged to pay it as contemplated. In a sense, therefore, it might be said, if this arrangement were carried out, that the city would be indebted for the sums secured by the mortgages. Certainly no account of its assets and liabilities would be correct which omitted this property from the one and the amount for which it was mortgaged from the other. Moreover, there is authority for the proposition that, if the city had itself mortgaged the property, and had stipulated in the mortgages that it should not be liable, but that the mortgagees should look to the land alone, such a transaction would be within the prohibition of the statute, and would not be upheld.² * * * The object of the statute is to protect the tax-

² Mayor v. Gill, 31 Md. 375;
Earles v. Wells, 94 Wis. 285, 68 N.
W. 964, 59 Am. St. 885.

payer by confining the indebtedness of the city within a prescribed limit. The manner in which the indebtedness is created is immaterial, if the result is to subject the city to a present liability, direct or indirect, which the taxpayers eventually will be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think that the statute can not be evaded in the manner proposed."³

§ 97. **Contract obligations payable in future.**—In the case of *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569, decided in 1909, the court of New York found that the term "city indebtedness" included contract obligations of a fixed amount to be paid for certain improvements to be made in the future, the court saying: "I refer to the question of whether certain outstanding contracts, validly entered into by the city for public improvements, should be regarded as an existing indebtedness within the purview of the constitution. There were on June 30, 1908, such contracts, which obligated the city to an amount estimated to be in excess of \$54,000,000, and except as to the amount which had been earned upon them, which is stated to have been on that day \$2,553,933.92, the referee has refused to include that sum as an indebtedness. I think the referee was in error."

After reaching its constitutional debt limit, the municipality will not be permitted directly or indirectly to make further purchases to be paid for from funds raised from taxation, for the reason that if such a purchase was permitted, it would constitute a clear evasion of the constitutional prohibition. This principle is established as follows in the case of *Hight v. Harrisonville* (Mo.), 41 S. W. (2d) 155: "However, having reached the constitutional limit of indebtedness, a city can not create a debt to be paid directly or indirectly, in whole or in part, from funds raised by taxation, or from a fund which must be replenished by funds raised by taxation. * * * In other words, provision is made for the city to purchase from itself, at a profit, power for its water plant, lights for its streets, and current for other purposes. The record shows that the city has no funds available for such purposes. If it purchases its own current, funds for

³ *Maine. Reynolds v. Waterville*, 92 Maine 292, 42 Atl. 553.

Maryland. Mayor v. Gill, 31 Md. 375.

Michigan. Ironwood Waterworks Co. v. Ironwood, 99 Mich. 454, 58 N. W. 371.

New York. Newell v. People, 7 N. Y. 9.

Wisconsin. Earles v. Wells, 94 Wis. 285, 68 N. W. 964, 59 Am. St. 885.

that purpose must come from funds raised by taxation, or from a fund which must be replenished by funds raised by taxation. In this situation, the parties resorted to the subterfuge of fixing the rate the city must pay itself for current without in express terms requiring the city to use its own current. * * * Therefore, they resorted to this subterfuge in an effort to evade the constitutional prohibition. The trick is so transparent that we do not wonder at the failure of defendants to undertake a defense of this provision of the contract. * * * The bar to the constitutional prohibition is clear, and we should not permit it to be evaded. The contract must be held invalid."

Municipal contracts for public utility equipment, evidenced by an issue of municipal bonds, are a liability of the municipality and must be paid according to the contract under which the bonds are issued, so that when they are payable out of funds raised by taxation, a tax for the purpose is valid and will be sustained, for as the court said in the case of *Security Trust & Savings Bank v. Los Angeles* (Cal. App.), 7 Pac. (2d) 1061: "But the question of the harshness or injustice of a provision of the city charter that permits a sufficient water charge to raise the money necessary to meet the principal and interest payments to become due on municipal improvement district bonds, while at the same time certain of such bonds, by reason of the fact that they were issued under the Improvement Act of 1915, are required to be paid by a tax upon the property in the district, is a question which it would seem proper to submit to the municipal authorities, but with which this court is not required to deal. * * * The bonds constitute a contract between the bondholder and the taxpayers of the district. Among other things, the contract (bond) contains the provision that 'the principal and interest of this bond are payable exclusively out of taxes levied upon the taxable property in said Municipal Improvement District No. 27,' and to substitute any other method for the payment of the bond would be to change the express terms of the contract, which is not permissible. * * * We are of the opinion that the provisions of the Municipal Improvement Act of 1915 (Stats. 1915, p. 99) are controlling with reference to the tax here involved, and that the tax was a valid tax."

Where a present municipal liability, which the taxpayer will finally be required to pay, is created in the purchase of the plant, the city is denied the power to make a contract, because the payments assumed would exceed the revenue and therefore,

would be void under the constitutional limitation, which is the effect of the decision in the case of *Mahoney v. San Francisco*, 201 Cal. 248, 257 Pac. 49, where the court said: "The transaction was held to fall within the inhibition of section 18, art. 11, of the Constitution, which precludes any city from incurring 'any indebtedness or liability in any manner or for any purpose' exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof. The city, as it was there said and as is true in the instant case, 'must either expend all the money necessary to complete the work from its future revenues or lose the property with all it may have paid to the time of loss in improving the same.

* * * The manner in which the indebtedness is created is immaterial if the result is to subject the city to a present liability, direct or indirect, which the taxpayer eventually will be called upon to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think the statute can not be evaded in the manner proposed.' The distinction between that case and the *McBean*, *Smilie*, and *Doland Cases* [*Doland v. Clark*, 143 Cal. 176, 76 Pac. 958; *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. 191, and *Smilie v. Fresno County*, 112 Cal. 311, 44 Pac. 556], is pointed out. The latter cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made, while in the former the full liability was created upon the acceptance of the deed. Here the consideration was the execution and acceptance of the contract of purchase and the putting of the city and county of San Francisco into possession of the property. * * * In other words, the city in the instant case did not have the power as a matter of law, to enter into the contract designated as Exhibit B. The allegations of the complaint tender issues of fact which ought to be considered in determining the validity of Exhibit A. It is alleged that the liabilities thereby assumed by the city do by both direct and indirect methods incur an indebtedness in excess of the income or revenue provided by said city and are, therefore, void as being in violation of the state constitution and city charter. In the absence of an answer denying said allegations they must stand admitted. We do not deem it necessary to pass upon said issues at the present time as they may be more properly and orderly

disposed of after the proofs have been made in accordance with the issues tendered."

§ 98. **Encumbering property before sale to municipality.**—The case of *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723, decided in 1910, is similar in principle to the one cited in *Browne v. Boston*, 179 Mass. 321, 60 N. E. 934. The case involved an attempt to purchase an electric light plant by evading the constitutional debt limit by means of mortgaging the plant to the extent of the excess amount with the provision in the contract of purchase that the municipality was not to assume or agree to pay the mortgage indebtedness. The court held that this was merely a device to avoid the constitutional limitation, for in effect the city would be obliged to pay the mortgage indebtedness or lose the property so that the amount of this indebtedness was really a liability assumed by the city by virtue of the attempt to purchase the property since the property was pledged to its payment.

§ 99. **Debts payable out of special fund.**—The case of *People v. Chicago & Alton R. Co.*, 253 Ill. 191, 97 N. E. 310, decided in 1911, held that so long as the bonds creating the debt are bonds issued by the city, the obligation is a municipal indebtedness although their payment was provided for out of a special fund, since as the court held all bonds issued by a municipal corporation are in effect payable out of a special fund.

The same court in the case of *Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861, decided in 1902, observed that: "We see no difference between mortgaging the public buildings and property of the city and mortgaging its system of waterworks. * * * The constitution makes no distinction in the nature of the power exercised with reference to contracting indebtedness, but the prohibition is against increasing indebtedness, in any manner or for any purpose, beyond the limit fixed."

That under the principle established in this *Joliet* case the city can not issue public utility certificates secured by mortgage and payable only out of the revenues of such utility without creating an "indebtedness" is clearly decided in the case of *Leonard v. Metropolis*, 278 Ill. 287, 115 N. E. 813, where the court said: "The present act provides that such certificates shall not be or become an obligation of the city payable out of any general fund, but shall be payable solely out of the revenue derived from the public utility or property for the acquisition of which they were issued. The *Joliet* case not only held that

the city could not issue certificates for the extension of its waterworks system and secure their payment by a mortgage upon the plant it then owned, where the city was already indebted to the constitutional limit, but also held that it could not mortgage or pledge the income then being derived from said system owned by it. That is precisely one of the things that is proposed to be done here. The city of Metropolis proposes not only to mortgage the plant it now owns, but also the income it receives from the operation of the plant, to secure the payment of the water certificates or public utility certificates."

§ 100. Bonds payable from revenue of plant.—This court in *East Moline v. Pope*, 224 Ill. 386, 79 N. E. 587, decided in 1906, also refused to sustain the liability of a municipality on the bonds issued in connection with the purchase of a system of waterworks which were to be paid out of the net revenue of the waterworks, and a special tax if the revenue from the waterworks was insufficient for that purpose. As the court expressed it: "If it were otherwise, the legislature could authorize the issuance of bonds for any proper municipal purpose in any amount, to be paid out of a tax levied for the special purpose of paying them, and thereby render nugatory the constitutional provision limiting municipal indebtedness."

In the case of *Schnell v. Rock Island*, 232 Ill. 89, 83 N. E. 462, 14 L. R. A. (N. S.) 874, decided in 1907, the Supreme Court of Illinois refused to hold valid, certificates payable out of the water fund and the special taxes which might be annually levied and made available for the purpose although the fund to be derived from the sale of such certificates was intended to be used in the extension and enlargement of the waterworks system. In the course of its opinion the court observed: "In this case the entire proceeds of the existing waterworks system were pledged to secure payment of the certificates, and they created an indebtedness against the city." The court, however, conceded that: "A city may acquire a system of waterworks by pledging the income until it shall pay for the system, and no indebtedness is created. The same rule might apply to some definite extension of waterworks where the income of the extension could be separated and applied to payment; but an obligation to pay with the income of property already owned by a city is not different from an obligation to pay with any other funds, so far as the question whether the transaction amounts to a debt is concerned."

Where all the revenue received from the water system, after

paying maintenance and operating expenses, was used to repay individuals who financed extensions of the system but without recourse on the city or the plant itself, this same court held that no constitutional indebtedness was created, because the municipal notes which were given by the city for this purpose were held to create only a liability payable out of the net earnings of the plant, in the case of *Ward v. Chicago*, 342 Ill. 167, 173 N. E. 810, where the court said: "Here all revenue received from the water system is to be deposited in a separate fund, out of which are to be paid all maintenance and operating expenses, and the remainder is to be available to pay back those who finance the proposed extensions by purchasing the certificates. * * * Here no portion of the plant is pledged for payment and holders of the certificates have no recourse save out of the proposed water fund. That the obligation of the city arose there out of a simple reciprocal contract, whereas here it would be represented by documents in the nature of negotiable notes, can make no difference so far as the question at issue is concerned. If no indebtedness within the constitutional inhibition was created there, no substantial reason exists for saying that any would be created here."

Where certificates of indebtedness are issued for the purpose of securing funds for the extension and rehabilitation of a municipal utility, and the profits derived from the operation of the plant are pledged for the purpose of retiring the certificates without any obligation being expressly imposed upon the city for which taxes might be levied, although the certificates of indebtedness were secured by a trust deed covering the entire plant, such certificates do not constitute a municipal indebtedness prohibited by the constitution. This limitation of the principle is established and well expressed in the case of *Jerseyville, Illinois v. Connett*, 49 Fed. (2d) 246, as follows: "In the instant case it does not appear that the old system was yielding the city any income. Indeed it might well be assumed from the pleadings as filed that the old system, in its outgrown and deficient state, was incapable of yielding the city any profit or income, and would so remain unless suitably supplemented. * * * The bill to enjoin issuance of the certificates was brought upon the theory that, since the certificates were an indebtedness of the city, they contravene section 12 of article 9 of the Illinois Constitution, in that the ordinance authorizing them did not provide for the collection of an annual tax to pay them. Thus the question was whether the certificates created

an indebtedness against the city. * * * Under the circumstances we do not think it can be fairly concluded that the giving of the trust deed upon the entire water plant constituted the certificates of indebtedness a present debt against the city, nor that the pledging of the entire income for the payment of the certificates had any such effect. * * * The cancellation of the \$40,000 of certificates would be equivalent to a cash payment by the city upon the new plant. * * * It is most likely that the attempted sale to the city of the enlarged plant, at a price equal to the total of the certificates, was with the view of having the transaction regarded as one where the certificates would represent the unpaid purchase-price, in which case, whether or not secured by the trust deed, they would not be an indebtedness of the city."

§ 101. "Mueller law" certificates.—The Illinois court in the case of *Lobdell v. Chicago*, 227 Ill. 218, 81 N. E. 354, decided in 1907, in construing a statute generally known as the "Mueller law" which was an act to authorize cities to own and operate or lease street railways and to provide the necessary revenue therefor, held that such street railway certificates when issued created an indebtedness of the city within the constitutional limitation, the court expressing its decision as follows: "It is too clear for argument that under the statute, the ordinance of January 18 and the trust deed or mortgage the use of the streets for street railway purposes is to be mortgaged for the benefit of the holders of said street railway certificates for the period of twenty years after a sale shall be made if the trust deed or mortgage is foreclosed; and, if the right to this use of the streets of the city is property, then the trust deed given to secure the payment of the \$75,000,000 street railway certificates proposed to be issued is something more than a purchase-money mortgage, and, within the doctrine of the *Alexander* and *Pope* Cases (62 N. E. 861, 79 N. E. 587), these certificates, when issued and sold, and the trust deed or mortgage given to secure them, will create an indebtedness of the city within the constitutional prohibition. * * * This court has nothing to do with the policy of the municipalization of street railways in the cities of this state."

For a further construction of the legal purpose and effect of the "Mueller Law" and certificates, whose issuance is held to constitute a "municipal indebtedness," an interesting discussion of the legal questions involved is furnished in the recent federal case of *Harris Trust & Sav. Co. v. Chicago R. Co.*, 39 Fed. (2d)

958: "The argument of interveners is that, with the expiration of the grant, made by the ordinance of February 11, 1907, and reaffirmed with modifications by the ordinance of November 13, 1913, all rights, duties, and obligations between the grantor city and the grantee railway absolutely ceased and determined on February 1, 1927. With this contention the court does not agree, for the reason that the city ordinance above referred to and the act of the Illinois Legislature on May 18, 1903 (commonly known as the Mueller Law, Illinois Statutes [Cahill's Rev. St. 1927], c. 131a, pars. 8-13), in pursuance of which these ordinances were adopted, seem to the court to manifest a clear intention not only to provide terms and conditions covering the city's consent to the use of city streets during the grant, but also to provide assurance, legally obligatory on the city, for the protection of the investment 'at and after' as well as 'during' the term expiring February 1, 1927. * * * Counsel for interveners admitted during the oral argument that the city had the right to exact 'reasonable compensation' for the use of city streets, but stated that he had formed no opinion and had no evidence to offer as to what would constitute 'fair compensation.' That the city has the right to exact compensation for the use of city streets by street railways is settled law in Illinois. * * * Under the constitution, not even the legislature has the power to grant the right to construct and operate a street railroad within a city without the consent of the common council. Section 4 of article 11 of the Constitution is as follows: 'No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad.' * * * To the court it seems obvious that the good-faith effort of the city to cooperate in a workable modus vivendi, pending the working out of a 'new settlement ordinance,' should be given cooperative support by the administrative appointees of the court, inasmuch as the court believes that such cooperation is, in the language of the above-quoted ordinance, 'desirable and necessary in the public interest and in the interests of the said companies and their properties and of the city.' * * * For the various reasons hereinbefore set forth interveners' application that the receivers be required to cease paying 55 per cent to the city is denied. Second. That the amount in the renewal and depreciation fund be now applied to the payment of the first mortgage bonds.

* * * The Mueller Law authorized, and section 23 of the ordinance of 1907 constituted, a valid contract, between the city and the street railway company, binding upon the city in the provision that in case 'the city shall grant a right to another company to operate a street railway in the streets and parts of streets constituting the said street railway system of the company such new company shall be required to and shall purchase and take over the said street railways, property and rights of the company at or after February 1, A. D. 1927, upon the same terms upon which the city might then purchase and take them over.' * * * Accordingly, interveners' application that the special renewal and depreciation fund be now applied to the first mortgage is denied. * * * Earnings from operation since the receivers were appointed have at all times been more than the currently accruing interest on all bonds plus the currently accruing compensation exacted by the city for the use of city streets. * * * The evidence shows that the payments ordered by the draft submitted can be made without impairment of the ability of the receivers to carry out the directions heretofore given for the purchase of sixty additional cars, or for the payment to the city of compensation for the use of city streets, or for other administrative requirements to preserve the integrity of the street railway system. Obviously, the reduction of the amount of the indebtedness which is drawing five per cent interest is to the ultimate benefit and advantage of all interests in the property which are subordinate to the indebtedness thus reduced. Therefore the court has this day signed the order in the draft form submitted by counsel for Harris Trust & Savings Bank."

§ 102. Purchase-price payable only out of revenue of plant. —In the case of *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888, decided in 1895, the waterworks were purchased with the understanding that payment of the obligations issued therefor should be made only out of the receipts of the waterworks system and that the city should not be liable to make any payment other than from this special fund. In sustaining the contract of purchase and holding that the purchase-price, which was to be paid only out of the revenues derived from the operation of the waterworks system, did not constitute a municipal indebtedness the court observed: "For the purpose of this case, it must be conceded that said waterworks will, in addition to supplying the money for the creation of such fund, as provided for in said ordinance, pay all the expenses incident to their operation, and for

that reason the creation of such special fund can occasion no liability upon the part of the city to make any payment out of its general funds. This being so, we are of the opinion that neither the ordinance, the contract, nor the obligations to be issued by the city in pursuance thereof, do or will constitute a debt of the city, within the constitutional definition. The only obligation assumed on the part of the city is to pay out of the special fund, and it is in no manner otherwise liable to the beneficiaries under the contract. The general credit of the city is in no manner pledged, except for the performance of its duty in the creation of such special fund. The transaction, therefore, is no more the incurring of an indebtedness on the part of the city than is the issue of warrants payable out of a special fund created by an assessment upon property to be benefited by a local improvement."

To the same effect is the holding of the court in the case of *Shields v. Loveland*, 74 Colo. 27, 218 Pac. 913, as follows: "Clearly the revenue bonds are not within that purpose. The public can never be overburdened by that which it is under no obligation to discharge, nor can the city become bankrupt by what it does not have to pay. Nor are these bonds a technical debt. Nothing is my debt unless a judgment for its amount can be recovered against me upon it. * * * Fundamentally this is a method of paying annually for street lighting annually furnished, and it has been held that contracts do not create debts within the meaning of the laws like those now in question. * * * This, taken in connection with the provisions of the ordinance and the revenue bonds themselves that they are payable only out of the income of the property, makes the matter beyond question."

To a like effect that the debt contracted in the purchase of a public utility payable only from the income derived from its operation should not be included in determining the amount of municipal indebtedness with reference to its constitutional limitations, the court in the case of *Twitchell v. Seattle*, 106 Wash. 32, 179 Pac. 127, expressed the principle as follows: "Viewed in the light thus far given, appellants may not complain for the purchase of a public utility payable from the revenues of the utility is not the creation of a debt within the meaning of the constitution. * * * We are satisfied the proposed plan and bonds will not create any indebtedness against the city, and that the city council has authority to consummate the purchase without the sanction of the qualified voters. What we have already

said disposes adversely of another contention of appellants that in pledging the whole of the gross revenues of the street railway system if necessary to pay the bonds and interest the city council acted arbitrarily, and in disregard of the statute to have due regard for the expenses of operation and maintenance of the system. All presumptions are contrary to such claim, while the ordinances and allegations of the complaints, as already seen, are wholly wanting in the discovery or statement of any facts suggesting arbitrariness on the part of the city council."

To the effect that bonds issued by municipalities on their public utilities payable only from the earnings of such public utilities do not constitute an "indebtedness" within the meaning of that term as used in the constitution is clearly indicated in the case of *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239, as follows: "It is conceded that, these bonds being payable, both principal and interest, solely from the earnings of the public utility, would not constitute an 'indebtedness' of the city within the meaning of the state constitution touching the debt limit. *Uhler v. City of Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998. The sole question is one of statutory power. * * * The section of the Public Utility Act (Remington's Code, section 8008), specifically relating to special fund bonds payable solely from the earnings of public utilities, provides that such bonds shall be 'executed in such manner and payable at such times and places as the common council or other corporate authorities of such city or town shall determine.' The dates of maturity of such bonds are thus distinctly left to the discretion of the common council or other corporate authorities of the city. The dates fixed by the council in this instance, therefore, impinge no provision either of charter or statute. Finally it is urged that the issuance of these bonds should be enjoined on grounds of public policy. We shall not pursue in detail the arguments advanced in this connection. It should suffice to say that we know of no better criterion by which to determine any given question of public policy than the utterances of the state legislature upon that question. As we have seen, the legislature, acting within its constitutional powers, has authorized the issuance of bonds of this character in the manner in which and for the purpose for which these bonds are to be issued."

A municipality may enlarge its plant with funds realized from its operation so as to provide for its inhabitants and even for customers outside its boundaries without submitting the question to popular vote because no question of municipal indebted-

ness or credit is involved. The principle is clearly stated in the well-reasoned case of *Newborn v. Kinston*, 199 N. Car. 72, 154 S. E. 76, where the court said: "Can a municipal corporation owning an electric light and power system enlarge the same and expend therefor funds derived from the operation thereof? Can a municipal corporation use any part of a sinking fund created by law for the enlargement, maintenance, or extension of a municipally owned light and power or water plant? Can a municipal corporation furnish light and power to customers outside the city limits? * * * Under these circumstances we are of the opinion that the city has the power to enlarge the plant without submitting the question of enlargement to popular vote. * * *

Assuming that the city has the power to enlarge the plant, under the circumstances disclosed in the record, it clearly appears that the funds for such enlargement are not to be derived from pledging the faith or credit of the municipality, but from the proceeds of the operation of the plant itself. The right of a city to use funds on hand for a public purpose is fully sustained by the decisions of this court. * * *

Therefore the second question of law raised by the record must be answered in the negative. However, the trial judge finds as a fact that the \$80,000 which the city proposes to use in enlarging the light plant was derived from profits from the operation of said plant, and was placed in the sinking fund by the city clerk without authority from the board of aldermen and for his own convenience in keeping the record of municipal accounts. Therefore it is clear that, upon the findings of fact made by the trial judge, the \$80,000 was never a part of the sinking fund of the city of Kinston, because a sinking fund is the creature of law and not the creature of a bookkeeper. Hence it was entirely proper for the city to make its records speak the truth and to segregate this fund from the general sinking fund provided by law. It was further found that the entire cost of enlarging the plant was to be paid solely and exclusively from revenue produced by the plant, and that no part of the cost of such improvement was to be raised by taxation. The third question of law has been answered in the affirmative in the case of *Holmes v. Fayetteville*, 197 N. Car. 740, 150 S. E. 624, *supra*. Assuming, however, that the third question should be answered in the negative, the record discloses, and the judge finds as a fact, that 'the furnishing of electricity, outside the corporate limits of the city of Kinston, has not and does not affect the necessity which may have arisen from the enlargement of the plant.' Hence the

fact that a small amount of electricity was sold outside the city limits has no determinative bearing upon the question of law involved."

Where it is expressly provided that bonds issued for a light and power plant should not constitute a lien on the plant and that municipal taxation should not be resorted to for the purpose of paying the bonds, which "shall be payable only out of the [plant's] revenues," the court held that the amount of this indebtedness was not municipal for the purpose of determining the constitutional limitations of municipal indebtedness, in the case of Franklin Trust Co. v. Loveland, Colorado, 3 Fed. (2d) 114: "This limitation on amount of indebtedness is also statutory. The amount of the bonds authorized by the city is in excess of three per cent of the assessed valuation. The right and power of the city to erect its own plant is not questioned or doubted; the restriction relates only to raising funds for that purpose. The ordinance authorizing the erection of the plant and the issuance of the bonds did not provide for a tax levy to meet payments of interest and principal or any part thereof.

* * * Section 8 of the ordinance provides that the bonds 'shall be payable only out of the revenues derived from the municipal light and power system placed in a fund to be created as in this ordinance provided, to be known as the Loveland Light and Power Revenue Fund.' * * * Relief was denied them, they appealed to the state Supreme Court and their case was finally disposed of by that court in its opinion found in Shields v. City of Loveland, 218 Pac. 913, 74 Colo. 27, wherein it was said: 'We do not think that they (bonds) amount to a debt within the intent of the constitution or statute.' * * * There is no ground for a claim that the bonds are to be a lien on the plant, or that the holders could look to the plant for their payment; nor can general taxation be resorted to for that purpose. The opinion of the state Supreme Court can mean nothing else. Even if our judgment was to the contrary, this ruling of the highest court of the state in its construction of the state constitution, statutes and city ordinances should be accepted by us as final and conclusive as against a litigant who brings the same question here. Any other course would result in intolerable conflict and confusion in matters of entirely local interest."

That an indebtedness payable only out of funds derived from the income of its municipal water system is not in violation of the constitutional provision against municipal indebtedness and does not constitute an hypothecation of the plant, for the ex-

tension and improvement of which the contract was made, is the effect of the decision in the case of *Garrett v. Swanton* (Cal. App.), 3 Pac. (2d) 1025, where the court said: "Respondents contend that the indebtedness or liability created by said agreement was not payable out of the income and revenue of the municipality derived from direct or indirect taxation, but that it was an indebtedness or liability payable out of a special fund created solely from the income derived from the water system of the said municipality, and that therefore the said agreement does not violate the said constitutional provision. There is abundant authority supporting this contention of respondents, both in the decisions of the Supreme Court of this state and in the courts of last resort of other jurisdictions. * * * We are of the opinion that the said contract was not in violation of the said provision of the constitution. * * * This ordinance authorized the expenditure of the water system fund for the indebtedness created by the said contract, to wit, expenditure for the improvement, extension, and enlargement thereof, and merely providing, as said contract did, for payment for such extension, improvement, and enlargement out of said fund did not constitute hypothecation of same. * * * The argument that the obligation of the legislative body of the city to safeguard the credit of the city by approving adequate water rates would amount to a 'liability' within the constitutional section is not persuasive."

§ 103. **Bonds for purchase of waterworks.**—The principle that such bonds when issued for the purchase of a waterworks system especially authorized by statute do not constitute a municipal indebtedness under the constitution is clearly expressed in the case of *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, as follows: "We think that bonds issued under the special statute providing for the acquisition of a public utility, where the ordinance provides that the cost shall be paid out of the gross revenues of the system when acquired, is not a thing to be considered in estimating the debt limit of the city. The charge is upon those who use the water, and not upon others. The revenues to be received under the plan proposed are not moneys of the city. They do not partake of the character of general funds, nor can the general fund be invaded if they are not sufficient. The system for collecting revenues and for the payment of these special bonds, provided by statute and by the ordinance, is in principle the same as if they were collected to pay street assessments."

Under statutory authority, permitting the ownership and operation of municipal public utilities with the approval of the qualified voters thereof secured at an election held for that purpose, the court of Alabama sustained the action of the city and held that it was not subject to the regulation and control of the public service commission in the matter, except as to rates and service regulations. This principle is clearly enunciated as follows in the case of *Culpepper v. Phenix City*, 216 Ala. 318, 113 So. 56: "There was manifestly no intention to say that a municipal waterworks is in all other respects to be governed and treated as an ordinary, privately owned and operated utility, under the Public Utility Act. And, certainly, notwithstanding their common duties and liabilities in the operation of a utility and the service to be rendered the public, it is clear that, in determining upon the policy of that undertaking, and in providing the means and facilities therefor, the municipality is in no sense a utility, nor acting as a utility, within the meaning and operation of the statute. On the contrary, the governing body of any municipality in the state is authorized, at its discretion, to order and hold elections at which the qualified voters shall determine whether bonds shall be issued by the municipality in order, among other things, 'to purchase or acquire waterworks and light plants, or to construct the same, or to provide the same by purchase and improvement or by improvement alone, * * * whenever such governing board deems it necessary.' Code 1923, section 2258. * * * It is inconceivable that the legislature could have intended, in the face of these plain and positive provisions, to have included municipal corporations among the utilities which are subjected in these respects to regulation and control by the public service commission. Very clearly the utilities thus subjected are those only which are privately owned and operated, and not those owned and operated, or to be owned and operated, by a branch of the government itself, and for the financing of which special provision has been otherwise made. Inasmuch as the Municipal Code does not expressly confer on municipalities the exclusive authority to fix rates and make service regulations with respect to municipally owned and operated utilities, the Public Utility Act (Code, section 941), out of abundant caution, reserves that authority to the municipalities."

A municipality has the power to acquire a waterworks system and to issue water revenue bonds as a means of payment, without submitting the question to its legal voters and securing the

assent of two-thirds of them. This action was sustained when taken in accordance with an ordinance authorizing it, which was passed in pursuance of statutory authority, under the decision in the case of *Sturgis v. Christenson Bros.*, 235 Ky. 346, 31 S. W. (2d) 386, where the court said: "On May 27, 1930, the board of council of Sturgis, a city of the fourth class, adopted an ordinance authorizing the construction of a water system for the city and providing for the issuance by the city of \$75,000 of water revenue bonds under the provisions of chapter 133 of the Acts of the General Assembly of 1926, as amended by chapter 92 of the Acts of the General Assembly of 1930, now sections 2741-1-1 to 2741-1-20, inclusive, Kentucky Statutes, 1930 Supplement. * * * It is the rule in this state that where two conflicting acts upon the same subject are passed at the same session of the legislature and their conflict is such that they can not be harmonized or made to stand together, the one containing the emergency clause will prevail over the one containing no such clause. *Naylor v. Board of Education*, 216 Ky. 766, 228 S. W. 690. But in our opinion there is no conflict between the two acts, and we find no difficulty in harmonizing the two which it is our duty to do if that can be done. Chapter 133 of the Acts of 1926, as amended and re-enacted by chapter 92 of the Acts of 1930, deals with the original purchase, establishment, and construction of a waterworks system, together with the extensions and necessary appurtenances thereto, while chapter 103 of the Acts of 1930 deals solely with waterworks or lighting systems theretofore acquired and of which the city of the fourth, fifth, or sixth class is the owner. In other words, if the city has become the owner of such waterworks system or lighting system it may not sell, convey, lease, mortgage, or otherwise encumber the franchise or the system itself without the assent of two-thirds of the legal voters of such city voting at an election held for that purpose. As the city of Sturgis does not propose to encumber a waterworks system already owned, but proposes merely to issue bonds for the purpose of acquiring a waterworks system, it follows that it could act without the assent of the two-thirds of the legal voters of the city and that the ordinances authorizing the construction and installation of the system, the issuance and sale of the bonds, and acceptance of the bid of the appellee, are valid."

If under the governing statute, municipal water and light plant bonds are considered as not having been issued "for general purposes," they are not included in determining the mu-

nicipal indebtedness because, in such case, they are paid by assessments against the parties specially benefited instead of by the taxpayers generally. This is the effect of the decision in the case of *Keplinger v. Kansas City*, 122 Kans. 158, 251 Pac. 413, where the court spoke as follows: "The soundness of this objection depends upon whether bonds issued for a city waterworks and light plant are to be included in computing the ten per cent of the assessed valuation, which is the limit placed by the statute upon the total amount of bonds the city may issue. This turns upon the interpretation of the statute—specifically upon what is meant by the phrase 'for general purposes' in an act providing that bonds for utilities, such as waterworks, shall not be taken into account in determining the limit of the city's power to issue bonds for 'general purposes.' * * * We agree with the conclusion of the district court that the phrase 'general purposes,' as used in the section quoted, refers to bonds issued for improvements the cost of which falls on the city taxpayers generally, as distinguished from those issued for improvements the expense of which is met by assessments against the property specially benefited. * * * Moreover, the added portion of the statute describes the character of bonds, the limit on the issuance of which is to be computed without regard to utilities bonds, as those issued 'for general purposes as provided for in this section.'"

Under its home rule charter and by virtue of special statutory authority, a municipality is held to have power, without vote of the electors, to issue bonds in any amount necessary to provide a waterworks system free of any constitutional provision as to debt limitation, in the case of *Newton v. Ft. Collins*, 78 Colo. 380, 241 Pac. 1114, as follows: "The question before us may be divided for discussion into two parts: First, can the city erect waterworks without a vote of the taxpaying electors? Second, can the city issue bonds for such purpose without such vote? On the first question: We have repeatedly held that the Twentieth Amendment conferred upon cities adopting charters every power possessed by the legislature in granting charters; therefore *Ft. Collins*, a self-chartered city, has constitutional power to erect waterworks. There is no constitutional provision requiring a vote of the electors, or any of them, for this purpose. * * * Upon the second question: The Constitution, art. 11, section 8, forbids municipal debts without a vote of electors, but excepts debts contracted for supplying water. The Twentieth Amendment, section 1, provides that a self-chartered city shall have

certain powers, including power to construct waterworks, and that: It 'shall have power to issue bonds upon the vote of the taxpaying electors, * * * in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.' It is claimed that this repeals the exception in said section 8 of article 11, and so requires a vote of electors even in case of water bonds. We do not assent to this claim. The purpose of the Twentieth Amendment was to extend the power of cities, not to further restrictions, which would be the result if we should sustain this claim; but even if that be not so, later expressions of such purposes are in section 6 of the Home Rule Amendment."

Where the authority for establishing a waterworks system differed materially from the system established and the municipality failed to secure the authority of the voters for the modification of the plan, the court held that the municipality had no authority to issue warrants for additional work, in *Mote v. Carlisle*, 211 Iowa 392, 233 N. W. 695, as follows: "Therefore, because of the exception or proviso and the law applicable thereto, we are constrained to hold that the curative act could not affect this pending litigation, and, if the warrants were invalid without the curative act, they still are void. Appellees contend, however, that the warrants are valid without the legalizing statute. With that idea we disagree. The very purpose of the appellee town's venture was to establish and erect a water system. Consequently its power in the premises is controlled by statute. Sections 6127, 6131, and 6132 of the 1927 Code. If the town has not complied with the statutory mandates, it has no power to issue the warrants. * * * Thereby a plan was used and the waterworks installed differed from the one authorized. Thus the waterworks finally established and erected were materially at variance with the original, and therefore the first authorization of the electorate did not cover the later expenditures. * * * An authorizing vote, therefore, was necessary under the statute. Even though the original proposition was voted upon, the additional expenditures were launched for the purpose of completing the original establishment and erection. Consequently the second work installed amounted to the establishment and erection of the waterworks just the same as the first undertaking. Accordingly under the statute a vote was imperative because waterworks can not be established and erected without authority from the people. * * * Whatever was done by the appellee town in the case at bar involved the one

purpose, to wit, establishing and erecting the complete waterworks. Until the well was deep enough to furnish sufficient water, the 'establishment and erection' was not completed. So it was essential that the appellee town comply with the foregoing statutory provisions and permit the electors therein to authorize the expenditure for the whole establishment and erection. Unless the electorate of the appellee town authorized the expenditure, there was no power in the municipality to incur it. Not having obtained the necessary authority from its electorate the town had no right to issue the warrants."

Where the municipal bond issue is secured by a mortgage on the entire municipal plant which furnishes more than one utility service, this does not amount to the encumbering of the plant of one utility for the benefit of another, because the plant is operated as a single utility and not as separate and distinct utilities, for as the court said in *McCann v. Morgan City*, 173 La. 1063, 139 So. 481: "This court has expressly held that waterworks and electric light and power systems, operating as one plant, as contemplated in the case at bar, and serving both users of water and electric current, may be hypothecated under the Constitution of 1921, article 14, section 14 (m), and Act No. 80 of the Extra Session of 1921, to secure bonds for the betterment of either service or for both services indiscriminately. *Gisclard v. City of Donaldsonville*, 159 La. 738, 106 So. 287. * * * There is, therefore, no attempt being made in this case, on the part of the municipality, to hypothecate an existing utility for the benefit of another separate and distinct utility, as the mortgage, when executed, will rest upon a combined or single city plant, furnishing water and light and power to the inhabitants of Morgan City."

Where a waterworks and an electric light plant is operated as a single unit, such a plant, including all its machinery and equipment, may be treated as one public utility and hypothecated for the improvement or extension of either or both services as occasion may require, for as the court said in the case of *Gisclard v. Donaldsonville*, 159 La. 738, 106 So. 287: "The electric light and waterworks plant is operated as one plant, serving both purposes. It was so constructed twelve years ago, and has been so operated ever since. All of the machinery and equipment that is used for supplying either water or lights—all of the machinery and equipment that is under roof—is under one roof. * * * All of which goes to show that, practically if not theoretically, this waterworks and electric light plant must

be deemed one public utility, which may be hypothecated for the betterment of either the waterworks or the electric light and power service, or for both services, indiscriminately."

§ 104. Payment same as by "special assessments."⁴—In *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, as there was no actual additional liability created against the city by virtue of its purchase of a waterworks system since the latter was to pay for itself, the court permitted the contract of purchase to be consummated although the purchase would have caused the city to exceed its constitutional debt limit had the purchase-price been regarded as a city indebtedness. The court based its decision by analogy on the principle involved in the law of special assessments on abutting property in connection with the improvement of a street or public highway, in which case, of course, there is no liability primarily on the part of the city, but only an undertaking to see that the property adjoining the improvement is assessed for the payment of such an improvement. This principle is generally applied to and is well illustrated by the so-called park-land purchases, where the title to land for park purposes is taken by the city and a mortgage given to secure the payment of the purchase-price on condition that there be no other or general liability of the municipality to pay said mortgage indebtedness except from funds raised by special assessments on the adjoining property on account of the benefits accruing to it by virtue of the use of the land for park purposes.

Although lands belonging to the municipality may not legally be sold to pay an assessment levied against them for the benefit of a bond fund of the district, the city is liable for the payment of the amount which may be derived either from its general funds or from a municipal tax levy. The liability being levied by analogy as a special assessment, so that the lands of the city were included, the amount due for municipal property must be paid by the city, although the municipal property itself is not liable for the payment and may not be sold to satisfy the obligation, because the property is municipal, although it would be liable itself and might be sold if necessary in case it was privately owned. In holding that the city is liable for its share of the district bond fund, because the city had included its property in the assessment of property for the benefit of the fund,

⁴ This section (§ 78 of 2d edition) cited in *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363.

the court held that the payment should be made out of its general municipal funds, in the well-reasoned case of *Pasadena v. McAllaster*, 204 Cal. 267, 267 Pac. 873: "It would be difficult to perceive a more direct obligation imposed on the city authorities to pay into the district bond fund the amount of the assessment chargeable against the city. It is conceded that the city's lands, although in form assessed for the improvement, may not legally be sold to satisfy the assessment in the manner provided for the sale of privately owned lands, or at all. The city's proportion of the acquisition cost must be paid into the district bond fund provided for by the act from the general funds of the city or from the proceeds of some general municipal tax levy. In any event, the taxpayers of the city as a whole bear the burden of the obligation thus incurred. * * * But the publicly owned property can not be so bound. The city is obligated under the statute to provide the equivalent of the amount assessed thereon and to pay the same into the district fund. * * * It is not the liability of the city generally on the bonds to be issued that presents the crucial questions. The liability of the city generally to feed the fund from which the bonds are to be paid is the vital point. That liability is definite, certain, and irrevocable during the full period of outstanding bonds and for the full proportion of the city's share. In principle this situation can not be distinguished from that wherein a city is proposing to acquire the land by purchase and is binding itself to provide the funds, either from the general funds of the city or from a levy of a tax on the property in the municipality as a whole to pay the cost of the acquisition. * * * The proceeding is instituted by the same governing body charged with the duty of providing the funds for the payment of the bonds. This governing body was under no compulsion to start the proceeding in the first instance. It was entirely optional with the city to proceed or not to proceed in the commencement thereof. Later it was likewise optional with said governing body to include or exclude from the assessment the property belonging to the city. Acting voluntarily in both instances, the city elected to commence the proceeding and also to include the city property in the assessment. Under these circumstances it would seem idle to argue that the obligation thus assumed is imposed by the law and therefore involuntary."

Holding that in an improvement district, created for the purpose of owning and operating an irrigation system for the irrigation of lands within its boundaries, the court regarded the pro-

ceeding more in the nature of a special assessment than of a general municipal improvement, so that the taxpayers of the district were given the right to decide on the making of such an improvement in the case of *Ramirez v. Electrical Dist., No. 4* (Ariz.), 294 Pac. 614, where the court said: "The classification by our constitution of different kinds of public corporations as 'municipal,' as is done in section 8, article 9, thereof, evidently was for the purpose of limiting the indebtedness of those public corporations whose functions more nearly assimilate those of a purely municipal character than those of irrigation districts. The latter are nothing much more than improvement districts intrusted with only sufficient taxing power to compel those directly benefited pecuniarily to contribute to the expenses thereof. They are organized for the specific purpose of providing ways and means of irrigating land within their boundaries and maintaining an irrigation system for that purpose. * * * In other words, they must, before incurring a bonded indebtedness to cover the estimated cost of the irrigation system planned by the board of directors as provided in section 3447, Revised Code of 1928, obtain the consent thereto of the property taxpayers of the district, who are also qualified electors thereof."

Where the municipality undertook to establish a special improvement district and to create a bonded indebtedness against the property within the district for the purpose of raising the necessary funds to install the plant, but failed to submit the question to the taxpayers of the district and to secure their permission for such action, the federal court decided that there was no liability on such bonds because of such failure. Since the bonds issued would be an indebtedness exceeding the constitutional limitation in the particular case, the municipality was also absolved from liability because, as the court held, there was no authority for the issuance of such bonds in the face of the constitutional limitation prohibiting their issuance under the circumstances. This limitation of municipal power was clearly indicated in the federal case of *Lumbermens Trust Co. v. Ryegate, Montana*, 50 Fed. (2d) 219, where the court said: "It seems clear that because of the constitutional inhibition the town was unable lawfully to contract for the installation of a water system without the approval of the taxpayers. It found that it could lawfully issue \$15,000 in bonds as a direct obligation and no more; consequently the town council by appropriate resolution and with apparent authority undertook the establishment of a special improvement district for the purpose of cre-

ating a bonded indebtedness against the property lying within the boundaries of such district to raise the money necessary to install the works hereinbefore described which were to be located in the special improvement district. It appears that the improvement district embraced the greater part of the town including the principal business and residential sections. By resorting to these two methods the town secured a waterworks system, such as was provided by contract, and has used the same for several years without paying for it, except the payment of \$15,000 in bonds of the town. The town apparently set about to accomplish in a lawful manner indirectly what it could not lawfully do directly without an election and favorable majority vote. * * * If in this instance the proper officers had been authorized to enter into the contract on the part of the town, after submitting the question to a vote of the taxpayers as required by law and receiving favorable action thereon, there would be no question whatever as to the liability of the town, irrespective of any mere oversight or irregularity in conducting the proceedings. * * * The funds here were used for a corporate purpose—a special purpose as to the improvement district and a general corporate purpose as to the town at large. * * * It is, of course, manifest that the town had exceeded its constitutional limit of indebtedness, but I can not agree with counsel that under the circumstances here there would be a general liability on the part of the town, and that the calling of an election to authorize additional indebtedness should be treated as a mere formality, and that the failure to call it would amount to no more than an irregularity. On the contrary, there was no power at all on the part of the town to incur such excessive indebtedness without the previous authorization of the qualified voters. After consideration of both sides of the issues, the court feels obliged to hold that the town of Ryegate did not become indebted to plaintiff on account of the special improvement district bonds delivered to it. In accordance with these views, judgment will be entered for the defendant."

§ 105. **Park-land-purchase certificates.**⁵—The park-land-purchase rule was well stated in *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281, decided in 1895, as follows: "And said board may accept title to lands and give back a mortgage or mortgages in the name of said city, with or with-

⁵ This section (§ 79 of 2d edition) cited in *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363.

out bonds to secure the unpaid purchase-price, provided, that no personal or general liability on the part of said city shall be created by any such contract, or mortgage, or bond beyond the means at the time available therefor, except the liability to pay such amounts as may be realized from benefits assessed on benefited property on account of the lands included in such contract or mortgage. And it is hereby made the duty of said board to pay on each such contract or mortgage an amount equal to the sum or sums so realized from such assessments.' * * * The certificates in question were given for the purchase-price of land for park purposes, and their payment secured by a mortgage on the land purchased. * * * 'It being expressly understood and agreed that there is no liability on the part of said city to pay the amount evidenced by this certificate and secured by the above-described mortgage out of any other fund than the fund above specified.' * * * Each certificate is a lien merely upon the particular land for the agreed purchase-price of which it was given, not upon any property which the city previously owned. * * * The debt of the city is neither increased nor diminished by the transaction. * * * In no event, nor under any circumstances, is the city liable, except as a trustee, to pay over to the certificate holder the amount actually realized from the assessments."

§ 106. **Option agreements of purchase.**—Where the agreement is in the form of an option taken by a city under which it may purchase the land at the price then agreed upon some time in the future if it so desires, but otherwise it is under no obligation and may refuse to exercise its option, which is the case of *Perrigo v. Milwaukee*, 92 Wis. 236, 65 N. W. 1025, decided in 1896, the court in sustaining such a contract and holding that it did not create municipal indebtedness, said: "But each of the legislative enactments mentioned expressly provides that such purchase, or agreement to purchase, should be 'without creating any corporate liabilities therefor'; and the agreement expressly provides that the same should 'not create any corporate liability against' the city 'in any manner or form,' and that the Perrigos would 'not claim any corporate liability against' the city 'by reason thereof.' * * * Does this optional agreement held by the city create a debt against the city and in favor of the Perrigos? Certainly not, since, as indicated, it expressly provides that the city shall not thereby be made liable in any manner or form. * * * The further payment by the city of any

portion of the purchase-price or interest or taxes is entirely optional with the city."

Under an option of purchase, a municipality was permitted to lease additional machinery for its water and light plant on condition that the lease payments would be made only out of revenue derived from the operation of the plant without any obligation against the city's general funds. In sustaining the power of the municipality to acquire the machinery under this option lease agreement, where no municipal indebtedness would be incurred, the court said in *Jones v. Corbin*, 227 Ky. 674, 13 S. W. (2d) 1013: "The rentals are to be paid 'out of the proceeds of the funds realized as provided by Ordinance 1120, and not otherwise.' At the end of the lease the city is given the right to purchase the machinery on condition that all instalments of rental have been paid. In case the lease is terminated otherwise than by purchase, the city is to turn the leased property over to the lessor in good condition, natural wear and tear excepted. Any failure by the city to pay any instalment of rent for 30 days after the same has become due, or any failure fully to keep or perform any of its other obligations as lessee, is a ground of forfeiture, should the lessor so elect and give fifteen days' notice prior to the date the forfeiture is to become effective. It is further conceded that, if the total sum to be expended for the lease of the equipment is to be treated as a present indebtedness, within the meaning of the constitution, it, together with other existing indebtedness, will exceed the constitutional limits. This is not a case where the obligation is payable at all events out of the general funds of the city. No tax can be levied to meet the obligation. It is simply a case where the rent is to be paid from revenue derived and to be derived from the light and water plant, and therefore only out of a special fund that will be increased materially by the use of the additional machinery."

§ 107. **Option to purchase waterworks.**—The Supreme Court of Wisconsin in the case of *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639, decided in 1906, applied this principle to the purchase of a waterworks system, giving its decision in the following language: "The distinguishing element, as then defined, consisted in the fact that the city could not be coerced by the creditor of its grantor into applying to his claim either its general revenue or property owned by it at the time of the contract, but was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own.

This distinction between conferring upon another power to take, in invitum, either general municipal revenue or property owned by the city prior to the contract, and a right merely to retake the property which is acquired by the contract or the earnings or proceeds thereof, is sustained in many decided cases. * * * We can discover no valid distinction between the park-land cases and the present situation. In both, the legislature had, to the extent of its power, authorized the transactions, had declared that the city should be under no legal liability, and that the burden on the property should not be deemed indebtedness within the constitutional limitation. Under no circumstances could the holders of these bonds recover any money judgment against the city for their principal. Nor is any property formerly owned by the city subjected to seizure by the bondholders. True, by enforcing their right to take away the water and lighting plant they may deprive the city of so much of its money as up to that time has been paid upon the purchase, but the same was true as to the park lands. * * * As to the hydrant rentals, respondents concede that this court has adopted the doctrine that a promise to pay for prospective services as they are performed, or instalments of interest for future forbearance of money, does not constitute any indebtedness until each instalment becomes due."

Where the necessary approval of the voters for the issue of bonds to acquire and maintain a waterworks system was secured, it is held that this is sufficient authority to purchase equipment for the plant, which is incidental to acquiring the plant itself. This principle is established in the case of *McDaniel v. Bristol*, 160 S. Car. 408, 158 S. E. 804, as follows: "We construe both the petition on the part of the freeholders and the question voted on in the election as clearly indicating that the freeholders desired, and the voters approved, an issue of bonds, which were to mature not later than forty years after their date. * * * In this instance, the voters, freeholders, and city council all charged with knowledge of the laws on the subject, knew that, under the Act of 1922, the bonds must mature within forty years from their date, and they also knew that, under the provisions of the Act of 1927, the bonds must be serial, as specified in that act. The city council is endeavoring to carry out the terms of these two acts, and for that reason we are unable to find merit in petitioner's second objection. * * * The Act of 1922 gives full power and authority to cities and towns to 'purchase, operate, and maintain waterworks.' The petition here re-

quested an issue of bonds, the proceeds of which were to be applied 'for the purchase of a waterworks plant and equipment and to operate same.' A waterworks system is bound to have 'equipment,' and equipment is a part of the plant. We see no real difference in meaning between the language employed in the petition of the freeholders and the question submitted to the voters and that used in the statute, and think the objection raised is entirely without merit."

§ 108. **Purchase of an electric light plant.**—The case of *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433, decided in 1907, furnishes a unique illustration of the practical application of the rule permitting a city to purchase for itself an electric light system by piecemeal, since its indebtedness was too great to permit the purchase outright. Section 157 of the Constitution of Kentucky, which controls the decision, provides in part that "no county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year." By a series of contracts the defendant city purchased different parts of the electric light plant at different times, paying cash out of the current revenue of that year in each case and taking title to the particular part as provided for by the contract in question. In sustaining the contracts and commending the practice of cash payment, the court said: "In this way the city has contracted no debt beyond its current revenues. It agreed to pay cash and has paid cash for all it bought. It accomplished this by not buying more than it had the means on hand, or certainly then due it, to pay for. * * * Appellant contends that the city could not legally contract for a light plant in piecemeal. The reason assigned is that no part of it is valuable as a public utility until all of it is assembled. The reason is not satisfying. * * * The course of appellee city in buying only what it could pay for, and as it could pay for it, is one that might be more frequently followed with satisfactory results to taxpayers."

In paying for machinery and other equipment for its electric light and power plant, in instalments and entirely out of the earnings of the plant, which itself is not pledged, any more than the municipality itself, for such payments, a municipality has the power to purchase such machinery and equipment on condition that it may be retaken in case it is not paid for out of the earnings of the public utility plant. This instalment plan of

paying for its equipment is established in *Bell v. Fayette*, 325 Mo. 75, 28 S. W. (2d) 356, where the court said: "Then it is provided that if the income of the said electric light and power plant is not at any time sufficient to make the instalment payments from the income in the same ratio and proportion that the income of the city may be reduced, the payments to Fairbanks, Morse & Co. shall be proportionately reduced. * * * Yet the contract in this case carefully and distinctly avoids that very contingency by making the payments solely out of the earnings of the Diesel engines purchased. The general revenue from the operation of a waterworks is not pledged to pay these instalments. No special or general tax could be levied for the purpose of making those payments; they can be paid only from the revenue, the savings, derived to the city from the use of these engines purchased. * * * The court held that the contract for the payment of such instalments did not create a debt within a provision of the constitution similar to ours. * * * *Barnes v. Lehi City* (Utah), 279 Pac. 878. The constitutional limitation on the debt which a municipality may incur contemplates a debt which must be paid by resort to taxation. Such limitations are intended to prevent an increased tax upon the people. * * * So the ordinance and contract to pay those instalments in the manner provided is not a debt within the prohibition of section 12, article 10 of the Constitution. In no event can a general tax be levied to pay the instalments; these payments constitute no lien upon the power plant nor upon its revenue. * * * A breach of the contract which might create a liability is not a debt created by the contract. Besides the remedy in such case is provided in the contract; the company could retake the machinery, remove it and have an accounting for the savings misappropriated by the city. Every possible contingency is provided for in the contract so as to prevent a general judgment against the city which would have to be paid by a levy of taxes."

§ 109. Debt accrues as service is furnished under serial contracts.—The contracts of a municipality to provide itself during a period of years with the conveniences of public utilities to be paid for in annual payments in the nature of rentals is generally regarded as a necessary municipal expense, and although the aggregate amount payable during the entire period may exceed the debt limit fixed by the constitution, the courts do not hold such contracts to be invalid for the reason that they are not regarded as incurring the entire indebtedness at the time the

contract is executed, but that the liability to pay annually during a series of years makes the annual payment after its maturity the extent of the indebtedness. A good statement of this rule which is generally followed is made in *Anoka Waterworks &c. Co. v. Anoka*, 109 Fed. 580, decided in 1901, as follows: "The admitted facts show that these works were necessary, and were generally desired by the inhabitants of the city, when contracted for, as conducive to their health and comfort; that all the terms of the contracts were reasonable, and entered into after advertising for proposals, and considering all offers of other parties; that the privileges and franchises granted were necessary for the construction and operation of the works, and were not exclusive; and that equitable provision was made by the contracts for the purchase of the works by the city, after any interval of five years, at the valuation of the same by appraisal. The objection that the contracts constituted the incurrence of an indebtedness on the part of the city, to a prohibited amount can not, in reason, be sustained. It is unnecessary to examine in detail the arguments presented in support of this objection. It is enough to say that these contracts did not, when entered into, create an indebtedness on the part of the city to the aggregate amount of the rates for water and lights for the thirty-one years. The indebtedness would only arise as the water and lights were furnished and used; and, if paid for as agreed, would never exceed the rates for six months."

§ 110. **Necessary service payable from current revenue.**—The case of *Allison v. Chester*, 69 W. Va. 533, 72 S. E. 472, 37 L. R. A. (N. S.) 1042, Ann. Cas. 1913B, 1174, decided in 1911, states this rule and the reason for it as follows, after observing that the great weight of judicial authority, including the decisions of the Supreme Court of the United States, is in accordance with the principle, and that it is in line with the better reasoning: "Where the contract or ordinance as in the case at bar is one intended to provide for the furnishing of a municipality with water to be used for public purposes, the payment therefor to be made from year to year, such contract should not be construed or treated as the creation of an indebtedness within the inhibition of our constitution except as to the amount actually fallen due, but as a mode or means of providing for the necessary current expenses of the municipal government. True, the revenues of succeeding years to a certain extent become bound for the future performance of the contract and beyond the discretion of the municipality to alter or abrogate; but to

supply the water is an absolute necessity, indispensable to the very existence of the people and without such authority to so contract a municipality would be entirely helpless."

Since the furnishing of water for a municipality and its inhabitants is authorized under the city's general municipal powers, the court holds that the construction and maintenance of a water system is a general undertaking of the city, which is payable out of its general funds, because the service is general and fundamentally necessary for the municipality and its inhabitants. This principle is recognized and well expressed in the case of *Newton v. Brodie* (Cal.), 290 Pac. 1059: "In construing the above provisions of the constitution and the Municipal Corporation Act, it has been held that each year's income and revenue must pay each year's indebtedness and liabilities, and that no indebtedness or liability incurred in one year shall be paid out of the income and revenue of any future year, and any indebtedness incurred contrary to the inhibition of the constitution and the statutes is absolutely void. * * * The development and distribution of water for the use of a municipality and its inhabitants is among the general powers granted to the city by the act under which it was created and to which it owes its existence (subdivision 3, section 862, Municipal Corporation Act), and clearly the construction and maintenance of a system of pipes and conduits for the purpose of carrying this power into execution would be an expense chargeable against the general income and revenues of such city. A division of the moneys belonging to the municipality into separate funds for administrative purposes is within the discretion of the legislative body of the city. No statute expressly authorizes the division of moneys of the city into such funds other than the funds required by law to be kept inviolate, and it may be conceded that the legislative power may segregate and divide its moneys into whatever separate funds its convenience or caprice may dictate. But in the exercise of this power a municipality is not permitted to arbitrarily create and maintain funds in its treasury, thereby making unavailable moneys which would otherwise be available for the payments due to its general creditors. If a municipality is not restricted in the payment of claims out of funds created by its charter, a fortiori, a city would not be limited to the payment of claims out of funds arbitrarily created by ordinance or resolution of its governing body unless otherwise restricted by law, and no such restriction exists."

A municipality has not the capacity to acquire and operate a

public utility and to contract for the purchase of its equipment and the payment of the same from a special fund and to maintain rates for the service of such utility that will produce sufficient revenue to make the payments called for by the contract, the court holding that the agreement as to rates was ineffective and that the constitution prohibited the creation of such a municipal indebtedness. Such is the effect of the decision in the case of *Miller v. Buhl*, 48 Idaho 668, 284 Pac. 843, for as the court said: "Buhl is a municipal corporation, a city of the second class. Desirous of owning and operating an electric light and power system of its own, it conceived a plan therefor, the legality of which is for determination in this proceeding. It proposes to construct an electrical distributing system from the proceeds of a bond issue already authorized, and to enter into a contract with Fairbanks, Morse & Co., for the purchase of a fully equipped electric power generating plant and pay the purchase-price from a special fund to be supplied from the rates to be collected from the product or service of the combined distributing system and generating plant. Among other things, it is provided in the contract, which this court is asked to prohibit the city from entering into, that title to the generating plant, which Fairbanks, Morse & Co. is to construct, will remain in them until the purchase-price is fully paid. * * * In the instant case, the city of Buhl proposed to bind itself to maintain rates for the service of the light and power system that will produce sufficient revenue to make the payments specified by the contract and evidenced by the pledge orders, 'so far as it is permitted to do so by law, such rates, however, shall not exceed rates now charged' in Buhl for like services. * * * Accordingly, since a city can not obligate itself with respect to its power to fix rates, the provision in the *Feil* case, to maintain rates and raise them, if necessary, was as ineffective as the agreement in the present case not to raise the rates. * * * On the authority of *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095, it is our conclusion that article 8, section 3, of the Constitution prohibits the city from incurring the obligation provided in the contract and induced by the proposed pledge order."

Where, however, the statute expressly authorizes the city to acquire and maintain public utilities and if possible to charge rates sufficient to pay for such a plant and its operation, the city was held to have the power to levy taxes found necessary to supplement the income derived from the operation of the

plant for the purpose of paying for the same in the case of *St. Louis-San Francisco R. Co. v. Andrews*, 137 Okla. 222, 278 Pac. 617: "It will be observed that the foregoing section specifically authorizes municipal corporations of the state to engage in any business or enterprise which may be engaged in by a person, firm, or corporation, and that every city containing a population of more than 2,000 (within which class the city of Blackwell stands) is expressly given the power to exercise the right of eminent domain even beyond the corporate limits of the city, in order to carry out the purposes of such public utilities (in the present case a waterworks plant). * * * It is true that said section 4507, Compiled Stat. 1921, provides that a city shall charge rates, as nearly as practicable, sufficient to pay the operating expenses and pay the interest on and create a sinking fund for the outstanding bond issue. But as we view this case, the amount of rates which a city may charge for its water is not really involved. It is the question of the authority of the city to levy the tax complained of that is really involved, that is the real question, and the plaintiff in error has not shown itself to have the authority or capacity to maintain a suit in reference to the rates charged for water by the city of Blackwell. Therefore, the mere question of the amount of rates which may be charged is not actually involved. Neither the constitution nor statutes specifically prescribe what rates may be charged for a municipally owned utility, nor to what purpose the profits derived therefrom must be appropriated. Hence said section 4507 is not decisive, nor even applicable to the question of validity of the tax levy made for the purpose of paying the interest on and creating a sinking fund for the waterworks bonds. We must conclude, therefore, that the levy involved in plaintiff in error's third cause of action was a valid levy, and that the judgment of the trial court should in all things be affirmed."

By way of encouraging municipal ownership of public utilities the court of Kansas indicates its willingness to indulge in the experiment of such ownership under proper statutory provision, in the case of *State v. McCombs*, 129 Kans. 834, 284 Pac. 618: "Municipal ownership of public utilities is new, the more modern utilities at least; consequently legislation for their management is bound to be empirical, and subject to frequent change as experience dictates; and the transfer of the control of the water and light plants from the general control of the city government to a special board having no other municipal concerns to attend to is quite a proper exercise of experimental legis-

lation. If it succeeds, good and well; if not, the legislature has plenary power to try something else or restore control to the governing body of the city. * * * Another objection to the statute is that it provides (section 13) that any bonds issued under its authority 'shall be a direct lien upon said water-works * * * payment of which shall be guarantied by the city at large.' The idea was broached in oral argument that such a provision might some time lead to a bondholders' suit, a sale in foreclosure, and a receivership for the city's water plant. That possibility is very remote. * * * The proposed issue of \$2,000,000 in bonds was 'for the purpose of supplying said city and its inhabitants with water' as well as for extension and betterments. It is quite correct that bonds voted or taxes levied by a municipality for one purpose can not be diverted to another purpose, but, in devoting a part of the bond issue voted 'for the purpose of supplying said city and its inhabitants with water' to the construction of the proposed flow line, that rule of law is not violated."

Where the contract provided for the payment of a municipal plant from a special fund so that no general liability is created against the municipality, the courts are generally agreed that such an indebtedness does not come within the constitutional inhibition, for as the court said in the case of *Butler v. Ashland*, 113 Ore. 174, 232 Pac. 655: "Unless, therefore, the obligation created by the contract under consideration is a general liability of the city and exceeds the limitation of indebtedness prescribed by its charter, the contract assailed in this appeal is within the powers of the council of the defendant city, and is lawful. The authorities are well nigh unanimous that, where a contract creating an indebtedness provides for a special fund with which to meet the indebtedness as the same accrues, and no general liability is thereby created against the municipality, such an indebtedness is not within the constitutional inhibition against creating a debt in excess of a fixed amount. * * * The language of the special obligation note limits the liability of the city to the water revenues. The special obligation notes, therefore, do not constitute an indebtedness against the city within the meaning of article 11, section 5, of the Constitution of Oregon. The provisions of the charter, under which the defendant city is acting, conferred the power to manage the water system upon the city council of Ashland. That charter specifically directed the city council to use the revenues from the disposal

of water in the specific manner provided for in the contract involved in this appeal."

Where it is provided that the revenue realized from public utilities shall constitute a sinking fund, the courts permit this fund to be used for other capital expenditures, and current expenses need not be limited to items that will be used only during the current year in which they are purchased. This rule is well expressed in the case of *In re Murray*, 140 Okla. 240, 285 Pac. 80, where the court said: "It is the contention of the protestant that under the provisions of section 4507, C. O. S. 1921, and for additional reasons, the operating profit of revenue producing public utilities must be deducted from the estimated needs for the sinking fund requirements, and such net profits should be used to retire the interest and three per cent of the principal on bonds issued for the acquisition or construction of such revenue producing utilities.' This contention is settled by the rule announced in *Perrine v. Bonaparte* (No. 19094), 282 Pac. 332, opinion filed October 15, 1929, wherein this court held: 'Neither statute nor constitution specifically prescribes rates to be charged by municipally owned utility; neither statute nor constitution specifically prescribes purpose to which profits derived from municipally owned utility must be appropriated.' As we view it, it is a matter of legislative discretion where a surplus from the water department shall be applied. * * * In our opinion, 'current expense' as used in our statute is not limited to items that will be used exclusively during the fiscal year in which they are purchased. There is nothing in our statutes prohibiting the making of 'capital expenditures,' including new equipment, main extensions, service installations, new meters, and meter box replacements, from the current expense fund. An appropriation for current expenses which includes items of a semipermanent nature, and which will remain for use after the expiration of the fiscal year in which they are purchased, is not, for that reason, void in whole or in part."

That the public utilities commission has no right or authority to question the power of the municipality owning and operating its own utility, to fix its rates, and determine what payment shall be made on its bonds from the revenue of the plant or from funds raised by taxation, because this is a local question in which only the municipality and its inhabitants are concerned, is the effect of the decision in the well-reasoned case of *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 Pac. 961, P. U. R. 1929A, 378, where the court said: "So, whether the

interest on and principal of the bonds shall be raised and met by taxation, or from charges from operation of the plant, it is a discretion given the city, and not the utilities commission. But here the utilities commission itself exercised the option. * * * It is believed that it was not the intention of the legislature to delegate, or that it had delegated, such a power to the commission. * * * Thus the acts subsequent to the Utilities Act are, as we think, indicative of an intention that the power of a municipality owning and operating its own utility to fix and determine its own rates and charges, and what interest payments on and principal of bonds shall or may be met by taxation and what not, was not intended to be and was not disturbed by the Utilities Act, and that the municipal power in such respect remained after as before the Utilities Act was adopted. * * * The primary purpose in fixing rates or charges of public utilities is to protect and safeguard rights and privileges of the public and to secure to it an efficient and an adequate service at reasonable rates, but not to fix rates or charges, or regulate or control the service, so as to deny the utility company reasonable compensation for its service, and certainly not so as to impair its business or deprive it of property or of a legitimate use or enjoyment of it. * * * If taxpayers and citizens of a town or city desire through their municipality to own and operate their own plant for their own use and for the use of the municipality at cost, they ought not to be denied the right or privilege, because a competitive and privately owned utility, operating a plant for gain and profit at the same place, may not be able profitably to furnish the product at a rate or charge lower than its standard rate, or at a rate proposed by the municipality. To say a municipality, its taxpayers and citizens, have the right to own and operate a utility, but may not be permitted to operate it at a rate less than a privately owned utility may supply the product at a reasonable profit, is, in effect, to deny to a municipality whatever advantage or ability it may have, if any, to furnish and supply the product at a rate or charge lower than that of a privately owned utility for gain and profit. * * * Now, the effect of the ruling of the commission is that to permit the city to continue to operate its plant it is required to make a charge sufficiently large to meet all such requirements, including expenses of operation and maintenance, without resorting to taxation, and that a rate which did not accomplish such purpose was 'in violation of law.' In that we think the commission not only erred, but failed to give proper effect to the statute.

* * * We thus think that, instead of the proposed rate of the city being 'in violation of law,' as declared by the commission, its order as made is itself 'in violation of law,' and on that, if on no other, ground should be annulled. * * * In all such cited cases a public utility sought the utilities commission for, and was granted, relief from contracts entered into by and with the public utility company with respect to rates and charges, on the ground that the rates and charges contracted for by it were or had become unreasonably low, and was granted a higher rate or charge as fixed by the commission."

A municipality does not have the power to pledge the income from its public utility property for the purchase of additional equipment for its plant under the doctrine of implied power, because the only authority given is for payment by a bond issue, which was not the method employed, and therefore the action of the city is held to be void and of no effect in the case of *Van Eaton v. Sidney* (Iowa), 231 N. W. 475, P. U. R. 1930E, 103, where the court said: "Regardless of what the law may be in other states, it is settled in this state that a municipality has no inherent power to make a contract of this kind. A municipality is wholly a creature of the legislature, and possesses only such powers as are conferred upon it by the legislature; that is, such powers as are granted in express words; or (2) those necessarily or fairly implied in or incident to the powers expressly conferred; or (3) those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient. * * * When the legislature attempts to make a grant of power to a municipality and the same is doubtful or uncertain, all doubts and uncertainties are resolved against the municipality. *Clark v. City of Des Moines*, 19 Iowa 199, 87 Am. Dec. 423. All powers conferred are to be strictly construed, and, in case of reasonable doubt, the power should be denied. * * * There is and can be no dispute that, under this section [Iowa Code 1927, § 6127] power is given to the town to purchase, establish, erect, and maintain an electric light and power plant when the necessary prerequisites have been complied with. When such question has been duly submitted to the electors, a majority of whom have voted in favor of the purchase or erecting of an electric light plant, section 6134, among other things provides that they shall have the power (2) 'to issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them.' * * * Applying

these rules to the case before us, the fact that it may be useful or convenient to the corporation to buy this machinery and pay for it by pledge warrants will not authorize the conclusion that it has the implied power to do so because it is not absolutely necessary to attain the end sought, the statute providing that it may issue bonds and pay the same by taxation. It follows, therefore, that the contract entered into is void and of no effect. Further than this, another question seems to be quite controlling, and that is the question of whether a city has power to pledge the income from its property for a definite period in the future. As to this question, the same general rules of construction apply that have been heretofore stated. There is no statute in this state conferring express power, in terms, upon a city to pledge its property, either personal or real, and we are unable to find any holding that there is inherent or implied power so to do. * * * Viewing the case under these well-settled rules and the facts in the record, we are necessarily driven to the conclusion that this contract was void and of no effect because of its attempt to pledge the rents, income, and profits of the electric light plant to be constructed in the future; hence we conclude that the decision of the district court was right. To the end that we may not be misunderstood, we are not holding that a bond issue is the only method by which an improvement of this kind may be acquired or built."

Because of the statutory provision requiring that all earnings of a municipal public utility shall be used for the payment of the bonds issued for the acquisition of such utility, no extensions or improvements may be made out of such fund until all liability on the bonds has been met, for as the court said in the case of *Uhl v. Badaracco*, 199 Cal. 270, 248 Pac. 917: "Language defining the powers of municipal corporations and grants thereto are to be strictly construed, and any fair reasonable doubt concerning the existence of a power is to be resolved against the corporation. * * * The charter does not contemplate the construction or extension of a public utility except in the manner hereinabove pointed out. To use the earnings of a public utility for this purpose would be to nullify the express provisions relating to the manner in which such utilities may be acquired, and thus destroy the limitation in this regard which circumscribes the power of the board. * * * From what we have said, it follows that it was never intended by the charter that the surplus earnings of a public utility could be diverted from the payment of the interest, and sinking fund requirements

of all the bonds issued for the acquisition of such utility, and that such earnings should be applied to the purposes recited in article 12, section 16, in the order in which they appear, so far as they are sufficient for such purposes before any extensions or improvements of the utility can be made with such funds. This conclusion is in accord with an express provision of the charter to the effect that the proceeds of any sale of bonds shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished. * * * This being so, there is no authority in respondents to make the contemplated expenditure at this time, as surplus earnings of a public utility can not be employed to make extensions and improvements until after the interest and sinking fund requirements have been provided for."

This same court, however, permitted a municipality to transfer the hospital site to its health department and the value of the site to its waterworks bond fund because such fund was no longer necessary for the purpose for which it was originally intended, as is indicated in the case of *Jardine v. Pasadena*, 199 Cal. 64, 248 Pac. 225, where the court said: "By ordinance No. 2176, the board of directors of the city transferred the particular property in controversy to the health department as a hospital site, at the same time transferring, from the general fund of the city to the waterworks bond fund, the amount of the market value of the land transferred to be used for purposes for which said bond fund might lawfully be expended. The transfer to the bond fund of a sum of money equal to the market value of the land in controversy, which the record shows was found by the board to be useless for the purpose for which it was first purchased, subverted the purpose for which the bonds were voted in the first instance. Inasmuch as the bonds were not voted for the purchase of this particular property, it was well within the general power of the city to control and dispose of it as its legislative body might deem best."

§ 111. **Debt only created when service furnished.**—In *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647, decided in 1891, the court makes the following excellent statement of the principle, recognized in *Allison v. Chester*, considered in the preceding section, and indicates the practical reason upon which it is founded: "Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the

yearly instalments, since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation, for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations can not contract for a long period of time for such things as light or water, the result would be disastrous; for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract."

§ 112. Current service payable out of current revenue.—This principle is clearly in accordance with the weight of authority and the better reason demanding a more liberal construction of the constitutional limitation where the commodity to be provided is practically a necessity which can properly be treated as a current expense and is therefore payable out of the current revenue as the particular commodity is furnished. The rule is in harmony with the principle of cash payment and accomplishes the purpose of the constitutional provisions limiting the expenditures in any given year to the amount of the revenues of that year, and it is of practically universal application as has already been indicated by the decisions except those of the Supreme Court of Illinois, which have been discussed, and that of Georgia in the case of *Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907, where the Supreme Court of Georgia takes the contrary and rather unique position that while a contract for water service for twenty years is illegal and invalid because in making it the plaintiff city exceeded its debt limit, the city is liable for such service for the first year and for any succeeding year it may accept service under the contract, which accordingly remained effective until repudiated by either party. In the course of its opinion, after conceding that it is opposed by the Supreme Court of the United States in the case of *Walla Walla, Washington v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77, and by the great weight of the authorities, the court said: "If we are correct in these conclusions, then the contract under consideration in the present case created a 'debt,' within the meaning of the constitution, the aggregate amount of which was the sum of the annual rentals therein

stipulated to be paid; and it is therefore illegal, and not binding except for the first year in which the contract was entered into, and for any subsequent years in which the municipality sees proper to receive at the hands of the waterworks company the benefit which the city might derive from the contract."

Pledging the receipts of its water system as a special fund does not create an indebtedness against the city under the constitutional provision for as the court in the case of *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107, said: "The income from the water system is about \$20,000 a month, and the amount is increasing. The city collects and disposes of this money, and has provided for placing one-half of the water income in the special fund. The city owns the water system, with a large amount of money invested therein. The people are dependent upon the city for their water supply which they must have for the conveniences and necessities of life. The city fixes the water rates, and enforces collection with practically the same regularity and universality that it levies and collects general taxes. The source of supply to the special fund is therefore to all intents and purposes as constant and certain as that of the general fund. * * * It is next suggested that the proposed pledging of the water receipts and the transfer from the general to the special fund will obligate the city for new indebtedness which it can not incur by reason of the constitutional limitation upon that subject. This court has already held that the mere pledge of the water receipts as a special fund does not create a debt against the municipality within the meaning of the constitutional inhibition. *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. City of Seattle*, 19 Wash. 320, 53 Pac. 365; *Dean v. City of Walla Walla*, 48 Wash. 75, 92 Pac. 895. We have also seen from what has already been said that the transfer from the one fund to the other creates no indebtedness against the city. It is a mere temporary loan to a fund, with an assured income, whose sources of supply are entirely under the control of the city. The city's general funds are not thereby in fact reduced, inasmuch as the credit of the general fund for the temporary transfer is the equivalent of cash as a working asset, and no new debt of the city arises."

In following this decision and holding that the pledging of existing property or receipts from its use for the purchase of other public utilities does not create such a "municipal indebtedness," the court in the case of *Scott v. Tacoma*, 81 Wash. 178, 142 Pac. 467, said: "In the *Griffin Case* the city loaned \$100,000

from the general fund to the special fund; the latter fund being pledged to its repayment. In this case the city pledges not to exceed fifty per cent of the revenue derived from the franchise taxes to the special fund, and obligates the special fund to return it. In this case as in the Griffin Case the special fund is under the control of the city and has an assured income. If the loan did not constitute a debt in the Griffin Case, the pledge of the franchise tax does not constitute a debt in the case at bar. Cases have been cited from other jurisdictions which hold that a pledge of existing property or its revenue to acquire a new public utility creates a debt. The contrary was held in the Griffin Case. Other cases are cited which hold that the laying of a tax running through a series of years for a like purpose is the creation of a debt. That question is not before us. We are not called upon to decide whether the special fund theory is extended beyond its logical limits in the Griffin Case. The rule which it announces has no doubt been followed by many municipalities in the state in acquiring or extending public utilities. This being true, the doctrine of *stare decisis* should obtain. We think the proposed plan falls within the principle announced in the Griffin Case."

This principle is well expressed and sustained by the court in the case of *Fox v. Bicknell*, 193 Ind. 537, 141 N. E. 222, as follows: "The Bicknell Water Company is selling its plant to the city of Bicknell, the consideration to be paid by bonds which state upon their face that they are not the obligations of the city but are payable only out of a special fund to be derived from the income from the plant. The city is not required to pay more for water for municipal purposes than the service is reasonably worth. There will not be one cent of money derived from taxation going into this fund that would not go into the coffers of the Bicknell Water Company if it continued to operate the plant. The city of Bicknell is not agreeing to pay any money raised by taxation, and is not pledging or mortgaging the property that it already has; nor is it pledging income or revenues from any source except the plant. Hence there is no legal or moral obligation on the part of the city to pay, its only duty being to manage the plant and take care of the fund."

That the city can not issue bonds for the purpose of raising revenue to loan to a street railway company for to do so would be creating a municipal indebtedness as well as exceeding its authority is well expressed in the case of *Cincinnati v. Harth*, 101 Ohio St. 344, 128 N. E. 263, 13 A. L. R. 308, as follows: "The

statute involved in the case at bar plainly and explicitly recognized the property right of the street railway company. When the city issues and sells its bonds, and uses the money of the taxpayers for renewing, replacing, and reconstructing the rails, ties, roadbeds, and tracks in the street, all of this new construction and new property belongs to the company, to be used and dealt with in every way that it can use and deal with any of its property. The only way provided by which the city is to be reimbursed is by assessing the company the cost of the things it gives to and does for the company, in addition to the declaration of the statute that the amount of the cost shall be a lien on the property of the company, that is to say it is a simple, plain loan by the city to the company of the amount of money needed for the purpose. The company becomes indebted to the city for the money the city has spent on the company's property. The company gets the property at once. It may borrow on it or sell it. The city has loaned its money and its credit to the company. It is the very thing that the constitution prohibits."

Highway improvement bonds whose payment is secured by the pledge of a gasoline tax, which might reasonably be expected to be sufficient to meet them without a property tax, do not constitute an indebtedness under the constitutional limitations, because of the special fund provided for their payment. In its decision to this effect the court also indicated that the interest on the bonds, as well as the bonds themselves are a special liability, neither of which are to be included in computing bonded indebtedness, for as the court said in the case of *Briggs v. Greenville County*, 137 S. Car. 288, 135 S. E. 153: "No property tax can be levied if these other funds prove to be sufficient to pay the principal and interest of the bonds as they respectively fall due. It is estimated by the state highway department that the entire state highway system described in section 1 of the Pay-As-You-Go Act can and will be constructed within eighteen years from and after the year 1924, by means of the funds provided by the act for that purpose, whether the work is done under reimbursement agreements or otherwise. This means, of course, that the funds will be sufficient to make the proposed reimbursements to Greenville county or to the road district of Greenville county within the eighteen-year period. Whether the county's share of the gasoline tax will be sufficient to provide for the payment of the interest on the proposed bond issue, without resorting to a property tax, does not appear from the record in this case. If the conclusion be reached that the prin-

cipal of the bonds is exempt from the constitutional limitations on bonded debt, it must follow that the interest on the bonds is also exempt, even though a property tax may be necessary in order to pay the interest. * * * This court has held a number of times that obligations of the same character as these bonds, secured by the pledge of a fund which might reasonably be expected to be sufficient to meet the obligations without resorting to the levy of a property tax, did not constitute bonded debt within the meaning of the constitutional limitations, notwithstanding that the full faith, credit, and taxing power of a political subdivision were pledged for the payment of the obligations."

CHAPTER 7

THE FRANCHISE

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§ 115. Grant by state of charter right to be a corporation.—The right of a corporation providing municipal public utility service to be a body corporate is a special privilege which does not belong to the people at large or to any individual or group of citizens as a natural right, and is commonly known as a char-

ter franchise. This franchise right or privilege to be a corporation is conferred by the state in the form of a charter granting the privileges especially provided by the charter itself, and is usually described as the general franchise or charter right to be a separate legal entity, and to exist as a body corporate.

§ 116. **Special franchise right to use streets and operate municipal public utility.**—The right to install, maintain and operate a municipal public utility plant and to enjoy the special privilege of occupying and using the streets within the particular municipality necessary to provide its service must also be specially granted, and such rights and privileges when conferred are commonly known as a special franchise, which is granted either by the state or more frequently by the municipality acting under authority delegated to it for that purpose by the state. As all corporations, including municipalities and those organized for the purpose of providing municipal public utilities, derive all their power from their creator, the state, which also primarily has absolute control of all highways within its territory, including the streets of the municipality, it necessarily follows that all power to be a body corporate as well as all the rights and privileges of providing public utility service in municipalities comes from the state.

Under the present constitution of Virginia, all charters of corporations including public utilities are issued by and under the direction of the state, "which has supreme control over the city streets," within constitutional limitations. As the charter constitutes a contract between the state and the public utility, the municipality can not relieve the company of any of its duties to the state, for as the court said in the case of *Ex parte Norfolk R. & Light Co.*, 142 Va. 323, 128 S. E. 602, P. U. R. 1926A, 98: "It is true that the charter was a contract, but it was a contract to which the city of Norfolk was not a party. The city could not add to the rights and privileges conferred, nor detract from the duties and obligations imposed by the charter. It had ample power, under the general law in force at the time (Code 1860, p. 327, c. 56, section 23), to protect its rights in the franchise granted the company to use its streets, but the duty imposed by section 3 was a duty to the state, which has supreme control over the city streets, subject to constitutional restrictions, and not a duty to the city, and from the duties imposed by the charter the city could not relieve the company, in whole or in part. * * * A charter of incorporation is a contract between the state and the corporation, in which no person is

legally interested except the parties thereto. * * * The Constitution of 1902 and the acts passed in pursuance thereof created a complete revolution in the creation, management, and control of corporations in this state. The constitution created the state corporation commission and gave it very extensive powers, but at the same time certain restraints were imposed, not only on the commission, but on the legislature as well. * * * The granting of charters and amendments is put on the same footing. Both are to be provided for by general laws. So, likewise, the 'rights, powers, and privileges,' of corporations are to be conferred by general laws only. These general laws, of course, can be enacted only by the legislature. The commission has no more power in this respect than this court. * * * The plain intent of the constitution is that the creation of corporations, the amendment and extension of their charters, and their rights, powers, and privileges, shall be governed by general laws applicable to all of their class alike, and that no opportunity shall be afforded to any tribunal or officer to show favoritism to any man or set of men. Even the power of the general assembly is restricted to the enactment of general laws in this matter. Rights, powers, and privileges of corporations not found in general laws do not exist. The right of a corporation to voluntarily surrender its charter is contained in the same section of the constitution (154) now under consideration, and in *Jeffries v. Commonwealth*, 121 Va. 425, 93 S. E. 701, after full argument, and a very thorough and careful consideration, it was held that the issuance of a certificate of dissolution was a purely ministerial act, which the commission could not refuse to grant if the preliminary requirements were complied with."

This same court, in permitting a street railway company to abandon a portion of its public service which was unprofitable, because to force a continuance of the service would amount to confiscation of property, indicated that the authority to grant such permission resides only in the state and that where circumstances justify such action, the court will sustain the state in granting the privilege, as is indicated in the case of *Portsmouth v. Virginia R. & Power Co.*, 141 Va. 44, 126 S. E. 366: "They state the reasons and cite many authorities establishing the proposition that such contracts so far as they directly relate to the public service are made subject to the reserved police power of the state. That a public service corporation can not be compelled to consume its property in public service, and thus be forced to submit to confiscation, appears to be perfectly well

settled. * * * It follows, therefore, that under the sovereign power of regulation, as the company may be required to establish and maintain such facilities, the state, under proper conditions and in order to avoid confiscation, may also decline to require their continuance, and permit the abandonment of such facilities, if the circumstances justify such action. * * * That the company should be authorized to abandon these tracks under the facts found by the commission is manifest, because their continued maintenance and operation would be the taking of the property without due process of law. While we have never before had occasion to consider the authority of the commission to permit the discontinuance of facilities theretofore devoted by transportation companies to the public service, its jurisdiction to grant such permission is based upon the same reasons and supported by the same authorities as the power which is as plainly vested in it to prescribe rates and to require facilities to be maintained."

§ 117. **Power to grant special franchises delegated to municipality.**—The streets of municipal corporations as well as all highways within the state are permanently dedicated and devoted to the use of the general public for transportation and communication. The state, however, acting through its legislature and in some instances by constitutional provision, has delegated to the municipality the power to grant the special privilege or franchise which is necessary to provide municipal public utility service. The control vested in the municipality over its streets is limited and defined by the statutory provisions delegating to it the right to grant such privileges as are necessary and proper for the operation of the public utility systems on such terms and conditions as the municipality sees fit to impose, within the power delegated to it and subject at all times to the requirement that the streets shall continue to serve the public as the means of travel and communication. Motor vehicles operating as common carriers in using streets and highways as their place of business must obtain the consent of the city and state to do so and are subject to regulation and control by them. And in all cases where the consent of the municipality is required by constitutional provision or statute before the municipal public utility may maintain and operate its plant, the municipality in question may impose such terms and conditions in connection with the granting of its consent as are reasonable and necessary.

§ 118. **Power of municipality subordinate to state.**—Unless the constitution provides that the consent of the city must be obtained before a municipal public utility may install and operate its plant, the legislature may impose additional terms and conditions and modify or revoke the conditions imposed by the municipality, because the power which has been delegated to the municipality may be recalled at any time subject only to the constitutional provisions and to the rights guarantied thereby.

This important distinction between the relation of the state to its agent, the municipality, and to the municipal public utility operating under a valid franchise or contract right, and the rights depending thereon is well defined by the court in the case of *Phillipsburg v. Board of Public Utility Commissioners*, 85 N. J. L. 141, 88 Atl. 1096, as follows: "It is now contended by the town, in answer to this exercise of jurisdiction by the public utility commissioners, that this ordinance and its acceptance constituted in legal effect a contract between the town and the company, which is protected from impairment by the familiar provisions of the federal Constitution. The concrete inquiry, therefore, presented by this situation is whether the state, by committing to an administrative board the power to regulate the conduct and operation of a quasi-public corporation, can constitutionally change the gauge of street car tracks to accord with what the legislature may conceive to be the public interest, where such gauge, under a prior legislative delegation of power to the municipality, was fixed by ordinance, the terms of which the company has accepted. It will be observed in this inquiry that the contractual relationship sought to be sustained is pleaded, not by the company, which is not before us as a complaining party, but by a municipal corporation, an arm of the state government, to which power *pro bono publico* was delegated by the legislature. It is not perceived how the question of the constitutionality of the acts of the public utility commissioners can enter, as between the state and its creature, the town, upon a mere proposal not to divest the municipality of any property right, but to transfer from the local municipal body to a general state board the legislative police power of street regulation, in the operation of street car companies, a power inherent in the state and of which it has not even *pro tanto* divested itself by prior temporary delegation to the municipality, to subserve what, at the time of the delegation, may be conceded to have been a local public interest. Were we dealing with a contention of this nature pressed by the railroad corporation, other

considerations would present themselves; but, as between the local body politic and its creator, the state, the principle is fundamental in our jurisprudence that the charter of a public corporation is not considered a contract, and does not come within the doctrine of the Dartmouth College case."¹

This same court in the case of *Eastern Telephone & Telegraph Co. v. Board of Public Utility Comrs.*, 85 N. J. L. 511, 89 Atl. 924, held that by virtue of the statute creating the board of public utilities the grant of franchise rights by municipalities is not valid unless approved by such public utility commission. In the course of its decision the court said: "No one would contend that, if, when the act authorizing the granting of these franchises was adopted, it contained a provision that no such franchise should be valid until approved by a board, or by any other state agency selected for that purpose, such limitation would not have been good, and if so, the legislature may, by a subsequent act, limit the effect of such power. * * * By the terms of this act, the board is not required, nor authorized, to approve, until it determines that the privilege for which approval is sought is necessary and proper for the public convenience, and in this case the board have found that such condition does not exist. It is argued that it would be absurd to interpret this act as conferring a power upon the board to prevent the municipality from making any designation whatsoever. With this we do not agree. The right to use the public streets and highways by these private corporations is derived from the legislature, and they have the power to say that, while a municipality may grant a franchise, it shall not be valid until approved by the board." And when the legislature has made certain regulations for the use of the streets of the municipality by the corporation providing municipal public utilities, the municipality in question under its delegated power to regulate can not impose other conditions which are inconsistent with those already provided by the state. The municipality is acting as an agent of the state in the exercise of delegated power and is subject to the will of the state and can place no limitations or conditions upon the corporation inconsistent with those which have already been imposed by the state itself. The nature and extent of the powers of municipal corporations in this connection necessarily varies and in any particular case is determined by

¹*Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629; *Newton v. Mahoning County Comrs.*, 100 U. S. 548, 25 L. ed. 710; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Pater-son v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385.

the statute granting the power, and when the grant is in general terms and free from restrictions the courts have permitted the city to impose any restriction or condition which is necessary or proper in the particular case including the limitation of the franchise period as well as the stipulation in detail for the regulation of the service to be rendered. This power of the city is public, governmental, and legislative rather than private or proprietary, however, and is subject at all times to the proper exercise of the police power as a means of regulating the service rendered in the operation of the particular system providing the municipal public utility service in question.

§ 119. **Municipal regulation by franchise provisions.**—Local municipal provisions for controlling and regulating the service must necessarily be provided, if ever adequately, when the franchise privileges to become a corporation and to make such use of the streets as is necessary to provide the public utility service in question are granted. For unless these special privileges are made the consideration for subjecting the grantees to the proper regulation and control, and unless this is specifically stipulated in the charter or franchise, there is no other adequate means except through the state of regulating the service and controlling the corporation providing it, aside from the police power, whose scope is as uncertain as it is elastic. Municipal corporations are finally recognizing the fact that the proper time and the only real, definite opportunity afforded them to impose conditions for the service to be rendered as a consideration for the granting of such special privileges is at the time of the grant and in connection therewith. The best illustration of this fact at present is the case of motor vehicles operating as common carriers for hire on the streets and highways. In the matter of their regulation the courts recognize the fact that the city and state have full and complete control, and the practical necessity for their regulation is very evident.

Under its franchise provisions a public utility may be required to improve and extend its service in order to meet the needs of a growing municipality, and the owners of the utility's securities may not object to such extension of service by virtue of the provision, previously made, for the disposition of the utility's earnings, for as the court said in the case of *Harris Trust &c. Bank v. Chicago R. Co.*, 56 Fed. (2d) 942: "It was within the power of the railways company to provide that all earnings, after the payment of certain sums to retire bonds and to pay interest and fixed charges, might be subject to the first lien of certificate

holders. The railways company was a public utility whose revenues were wholly dependent upon its use by the public. The extent and character of its service to the public was not a matter solely for it to decide, and the necessity for improvements and extensions depended largely upon the needs of a large growing city. Their necessity was not for the public utility alone to determine. * * * The certificate holders are estopped from now questioning the validity of any order of the commerce commission."

§ 120. **Franchise a contract.**²—That public regulation and control of the corporation providing such service is the only means by which proper service at reasonable rates can be assured because competition is not a sufficient force to control a natural monopoly will be discussed later. The nature of the rights which the municipal public utility enjoys under and by virtue of the franchise privileges conferred upon it in connection with its incorporation and the grant of the right to use the streets for the installation and operation of its system providing municipal public utility service is the point now under discussion; and it is the general rule that the granting of such special privileges by the state or municipality acting under proper authority and their acceptance by the municipal public utility constitutes a valid contract which can not be impaired unless the grant is made subject to the power of the municipal corporation or the state to alter, amend or repeal it. The rights which are thus created are protected by the constitutional provision prohibiting the impairment of contract rights or vested interests.

That the franchise constitutes a contract which the court will sustain where the parties had the capacity to enter into the contract is the effect of the decision in the current case of *Petroleum Exploration v. Joseph Greenspon's Sons Iron & Steel Co.*, 52 Fed. (2d) 944, where the court spoke as follows: "This is an appeal from an interlocutory injunction, enjoining appellants from proceeding under a franchise granted by the city of Corbin to Petroleum Exploration, August 8, 1930, and by that company assigned to its subsidiary, the People's Gas Company, September 17, 1930. The decision of this court in *City of Cor-*

² This section (§ 92 of 2d edition) cited in *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363.

This section of third edition cited in *Northern Texas Utilities Co. v.*

Community Nat. Gas Co. (Tex. Civ. App.), 297 S. W. 904, *affd.* in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

bin, Ky. v. Joseph Greenspon's Sons Iron & Steel Co., 52 Fed. (2d) 939, disposes of all substantial questions presented on the record, except the validity of the franchise. * * * The Petroleum Exploration was in position to meet all the terms of the ordinance. Whether the People's Company, to whom the franchise was assigned, was in like position at that time is unimportant. It is stated in the brief for appellee that the People's Company is a subsidiary of Petroleum Exploration. The latter company is apparently operating through the former. Whether so or not, the Petroleum Company possessed all the qualifications of a bidder at the time the franchise was bought, and the later assignment of the franchise to the People's Company was approved by the city. Appellee says that the city approved the assignment without investigation, which indicates that the requirements of the ordinance were not made for the purpose of insuring an adequate supply of gas. The reasons for the approval of the assignment do not fully appear in the record, and, considering the size of the city of Corbin, it is not too much to assume that the board of commissioners knew that it was the purpose of Petroleum Exploration to operate through the People's Company, or that the latter company owned or had under lease sufficient wells and gas lands to carry out the terms and conditions of the ordinance."

§ 121. Franchise grants on acceptance become contracts.³—The grant by the state of the right to be a body corporate as well as the special franchise privilege conferred directly or by delegation through the municipal corporation of the right to own and operate a municipal public utility system in the streets of the municipality, when accepted and acted upon by the corporation, constitutes a contract equally binding upon the state and the municipality and creates vested property interests which can not be impaired or destroyed unless the power to do so is reserved as a condition of the grant, except in so far as the police power permits of the regulation of the use and enjoyment of the rights so granted in the interest of the public health and the general welfare, to which the exercise of all powers and the enjoyment of all rights are naturally subject. "Indeterminate permits" for which many public utilities surrender their fran-

³ This section of third edition cited in *Northern Texas Utilities Co. v. Community Nat. Gas Co.* (Tex. Civ. App.), 297 S. W. 904, *affd.* in

Community Nat. Gas Co. v. Northern Texas Utilities Co. (Tex. Civ. App.), 13 S. W. (2d) 184.

chise rights are granted subject to the continuing right of regulation and control by the state commission.

§ 122. **Rights subject to public regulation and control.**—This rule has been generally recognized since the case of *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 27 L. ed. 629; but in so far as the business of providing municipal utilities is public and concerns all the people of the state or municipality, it has been regarded as affected with a public interest and subject to public regulation and control under the doctrine of the case of *Munn v. People of Illinois*, 94 U. S. 113, 24 L. ed. 77.

The right of common carriers to use the streets and highways for the purpose of conducting their business for profit which is now being so extensively done by motor vehicles was recognized and the principle of the power of the state or city to regulate such use enunciated in the early case of *Commonwealth v. Matthews*, 122 Mass. 60, decided in 1877, where the court said: "We have no doubt of the power of the board of aldermen to establish such a regulation, under the authority given them by the General Statutes, chapter 19, section 14. There is nothing, in the terms of that statute, that confines their powers to the making of rules as to the running of carriages in the streets; and it is manifest that the inconvenience occasioned by allowing them to stand at railroad stations, and other crowded places, might require equally minute regulations. The power to regulate is given in the most general terms, and we can not say that the manner in which it is exercised is unreasonable. There can be no doubt that the purpose and meaning of that section is to authorize the board of aldermen to prescribe the place at which the carriage is to stand."

The courts can not change rates for public utility service at the request of the utility when the franchise was granted by the city subject to certain rates although the power of rate regulation remained vested in the state because it was not expressly delegated to the city. Until this right to fix and regulate rates is exercised by the state, however, the rate so fixed by the franchise is binding on the parties to it, for as the court in the case of *Sumter Gas & Power Co. v. Sumter*, South Carolina, 283 Fed. 931,⁴ said: "It is true this power to contract for

⁴ The case of *Sumter Gas & Power Co. v. Sumter*, South Carolina, 283 Fed. 931, was taken to the United States Supreme Court where, upon stipulation and motion, it was

remanded to the district court with directions to dismiss bill without prejudice. *Sumter Gas & Power Co. v. Sumter*, 266 U. S. 639, 69 L. ed. 482, 45 Sup. Ct. 11.

the use of the streets and the conditions of the use, implied in the power granted to make regulations as to streets, is subject to the general police power of the state to regulate rates of public service corporations. Since the state legislature did not in express terms confer upon the municipality the power to make an irrevocable contract as to such rates, any rate fixed by such contract was subject to regulation under the police power of the state. * * * Therefore the ordinance of the city granting the use of the streets for gas mains with conditions as to rates to be charged, accepted, and acted upon by Rieha, in whose favor the franchise was granted, became a contract binding on both parties, subject to the exercise by the state of its police power to regulate rates. Since the state has not undertaken to exercise its right to alter the rates contracted for, they are still binding on both parties and are beyond the control of the court. The courts can not grant relief against rates named in a contract binding on the parties. *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 41 Sup. Ct. 400, 65 L. ed. 764. * * * Having accepted the agreement and received the benefits of it, the gas company has no ground to complain of its subsequent legislative sanction and ratification."

A current illustration of the general provision now frequently found in franchises of the right of amendment, alteration, or repeal is furnished in the case of *South Porto Rico Sugar Co. v. Munoz*, 28 Fed. (2d) 820, P. U. R. 1929B, 629, where the court set out the general rule as follows: "On May 28, 1928, the public service commission of Porto Rico issued to appellants an order of notice to appear on June 4, 1928, and show cause why said commission should not cancel a franchise granted, on March 19, 1901, to appellants' predecessors in title, by the executive council of Porto Rico, to use daily 20,000,000 gallons of the waters of Lake Guanica for irrigation, for the construction and operation of a private railroad to run in part over lands subject to public rights, and to construct and maintain a dock on the Bay of Guanica. Without appearing before the commission, the appellants filed on June 2, 1928, a bill in equity seeking an injunction to restrain the commission from interfering in any way with the enjoyment of their powers under this franchise, and from asserting any jurisdiction over the appellants in respect to said franchise. The court below sustained a motion to dismiss filed by the attorney general of Porto Rico, holding, in a well-reasoned and cogent opinion, both that the suit was premature

and that the public service commission had jurisdiction. This decision was right on both points. Courts have no general supervisory power over such tribunals as public service commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights. * * * 'That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to * * * repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: provided, however, that all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to congress, which hereby reserves the power to annul or modify the same.' Franchises and laws were both thus required to be reported to congress, which reserved power to annul either or both. * * * 'That all franchises, privileges or concessions granted under section 32 of said act shall provide that the same shall be subject to amendment, alteration or repeal.' This was the familiar provision intended to meet the doctrine of the Dartmouth College case. Pursuant to these powers, the executive council the next year (1901) granted the franchise in question, providing in Article XVIII 'that the franchises, privileges and concessions hereby granted shall be subject to amendment, alteration or repeal.' The same general power to annul laws enacted by the legislature of Porto Rico is retained in section 34 of the second Organic Act—the Jones Act of March 2, 1917, 39 Stat. 951. 48 U.S.C.A., section 822 et seq. In thus reserving in both Organic Acts power to annul laws enacted and franchises granted by the Porto Rican government, congress acted in close analogy to its long-continued practice with relation to territories within the boundaries of the present United States—prospectively states. It also provided in section 38 for a public service commission, and enacted: 'That said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to congress, which hereby reserves the power to annul or modify the same.' 48 U.S.C.A., section 750. Congress thus apparently vested full control over fran-

chises, old and new, in the public service commission. But the Jones Act also vested in the Porto Rican legislature (compare sections 25 and 37) general legislative authority over all matters of a legislative character not locally inapplicable or inconsistent with the provisions of the Organic Act. * * * We are constrained to hold that the purpose of congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when congress sees fit. The reservation of the power to annul franchises granted by the executive council is in the same general terms as the reservation of the power to annul all laws. It did not in 1901 exclude the power granted by fair and necessary implication to the executive council to modify or repeal franchises granted by that council. The like reservation contained in the Jones Act does not exclude or cut down the power of the public service commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation."

§ 123. Franchise rights available to inhabitants.—That the right to be a corporation and to conduct the business of providing the inhabitants of municipalities with the service of municipal public utilities when granted by the proper authorities and accepted by the corporation constitute valid contracts between the parties concerned, available to and for the benefit of the citizens of the municipality, and that such rights can not be impaired because of the constitutional provisions protecting them, or altered or materially changed unless the contract is made subject to an express condition to that effect except by the mutual consent of the parties or by the exercise of the police power and their exchange for "indeterminate permits" is the general rule as expressed and applied in the following leading cases on this subject.⁵

⁵ United States. New Orleans Gas Light Co. v. Louisiana Light &c. Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; St. Tammany Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405; Peoples Gas-light &c. Co. v. Chicago, Illinois, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. 520; Blair v. Chicago, Illinois, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; Interstate Consol. St. R. Co. v.

State of Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. 26, 12 Ann. Cas. 555; Minneapolis, Minnesota v. Minneapolis St. R. Co., 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. 118; Grand Trunk Western R. Co. v. South Bend, Indiana, 227 U. S. 544, 57 L. ed. 633, 33 Sup. Ct. 303, 44 L. R. A. (N. S.) 405; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, 34 Sup. Ct. 517, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282;

New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 59 L. ed. 84, 35 Sup. Ct. 72, L. R. A. 1918E, 874, Ann. Cas. 1915A, 906; Detroit United Ry. v. Detroit, Michigan, 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. 87, P. U. R. 1917B, 1010; Cincinnati, Ohio v. Cincinnati &c. Trac. Co., 245 U. S. 446, 62 L. ed. 389, 38 Sup. Ct. 153; Northern Ohio Trac. &c. Co. v. State of Ohio, 245 U. S. 574, 62 L. ed. 481, 38 Sup. Ct. 196, L. R. A. 1918E, 865; Mitchell, South Dakota v. Dakota Central Tel. Co., 246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. 362; Houston, Texas v. Southwestern Bell Tel. Co., 259 U. S. 318, 66 L. ed. 961, 42 Sup. Ct. 486, P. U. R. 1922D, 793; Wichita R. &c. Co. v. Public Utilities Comm., 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51; Durham Public Service Co. v. Durham, North Carolina, 261 U. S. 149, 67 L. ed. 580, 43 Sup. Ct. 290; Paducah, Kentucky v. Paducah R. Co., 261 U. S. 267, 67 L. ed. 647, 43 Sup. Ct. 335, P. U. R. 1923C, 309; Georgia R. &c. Co. v. Decatur, Georgia, 262 U. S. 432, 67 L. ed. 1065, 43 Sup. Ct. 613, P. U. R. 1923E, 387; Georgia R. &c. Co. v. College Park, Georgia, 262 U. S. 441, 67 L. ed. 1074, 43 Sup. Ct. 617, P. U. R. 1924A, 527; Superior Water, Light &c. Co. v. Superior, Wisconsin, 263 U. S. 125, 68 L. ed. 204, 44 Sup. Ct. 82; Opelika, Alabama v. Opelika Sewer Co., 265 U. S. 215, 68 L. ed. 985, 44 Sup. Ct. 517; St. Cloud Public Service Co. v. St. Cloud, Minnesota, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. 492; Fort Smith Light &c. Co. v. Bourland, 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249, rehearing denied and opinion amended in 268 U. S. 676, 69 L. ed. 631, 45 Sup. Ct. 511; Southern Utilities Co. v. Palatka, Florida, 268 U. S. 232, 69 L. ed. 930, 45 Sup. Ct. 488; Henderson Water Co. v. Corporation Comm. of North Carolina, 269 U. S. 278, 70 L. ed. 272, 46 Sup. Ct. 112, P. U. R. 1926B, 666; Ohio Public Service Comm. v. State of Ohio, 274 U. S. 12, 71 L. ed. 898, 47 Sup. Ct. 480; United Fuel Gas Co.

v. Railroad Commission, 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150, P. U. R. 1929A, 433; Larson v. State of South Dakota, 278 U. S. 429, 73 L. ed. 441, 49 Sup. Ct. 196; Railroad Commission v. Los Angeles R. Corp., 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. 71.

Federal. Cleveland Gaslight &c. Co. v. Cleveland, Ohio, 71 Fed. 610; Capital City Gas Light Co. v. Des Moines, Iowa, 72 Fed. 829; Lewis v. Newton, 75 Fed. 884, affd. in 79 Fed. 715; Morristown, Tennessee v. East Tennessee Tel. Co., 115 Fed. 304; Columbia Ave. Sav. Fund &c. Co. v. Dawson, Georgia, 130 Fed. 152; Wichita, Kansas v. Old Colony Trust Co., 132 Fed. 641; Omaha Water Co. v. Omaha, Nebraska, 162 Fed. 225, 15 Ann. Cas. 498, affd. in 218 U. S. 180, 52 L. ed. 1136, 28 Sup. Ct. 762; Southern Bell Tel. & T. Co. v. Mobile, Alabama, 162 Fed. 523; Boise City, Idaho v. Boise Artesian H. & C. Water Co., 186 Fed. 705, cert. denied in 220 U. S. 616, 55 L. ed. 611, 31 Sup. Ct. 720, dis. in 230 U. S. 98, 57 L. ed. 1409, 33 Sup. Ct. 1003; Pocatello v. Murry, 206 Fed. 72; Montana Water Co. v. Billings, Montana, 214 Fed. 121, appeal dis. 224 Fed. 1021; Wichita, Kansas v. Wichita Water Co., 222 Fed. 789; Iowa Tel. Co. v. Keokuk, Iowa, 226 Fed. 82, P. U. R. 1916B, 41; Wichita Water Co. v. Wichita, Kansas, 234 Fed. 415, P. U. R. 1916F, 947; Los Angeles Gas &c. Co. v. Los Angeles, California, 241 Fed. 912, P. U. R. 1917F, 833, affd. in 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76; Ashland Waterworks Co. v. Ashland, Kentucky, 251 Fed. 492; Columbus R., Power &c. Co. v. Columbus, Ohio, 253 Fed. 499, P. U. R. 1919B, 249, affd. in 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1648, P. U. R. 1919D, 239; Salem, Oregon v. Salem Water, Light &c. Co., 255 Fed. 295, P. U. R. 1919C, 956; North America Constr. Co. v. Des Moines City R. Co., 256 Fed. 107; Shreveport, Louisiana v. Southwestern Gas &c. Co., 258 Fed. 59, affd. in 261 Fed. 771, cert. denied in 252 U. S.

585, 64 L. ed. 729, 40 Sup. Ct. 394; Hillsdale Gaslight Co. v. Hillsdale, Michigan, 258 Fed. 485, P. U. R. 1919F, 941; Knoxville Gas Co. v. Knoxville, Tennessee, 261 Fed. 283; Livingston, Montana v. Monidah Trust, 261 Fed. 966; Jamestown, New York v. Pennsylvania Gas Co., 263 Fed. 437, P. U. R. 1920E, 379, mod. in 1 Fed. (2d) 871; Arkansas Nat. Gas Co. v. Consumers Gas Co., 264 Fed. 804; Gas &c. Securities Co. v. Manhattan &c. Trac. Corp., 266 Fed. 625, dis. in 262 U. S. 196, 67 L. ed. 946, 43 Sup. Ct. 513; Sumter Gas &c. Co. v. Sumter, South Carolina, 283 Fed. 931, P. U. R. 1923B, 755, motion to remand granted in 266 U. S. 639, 69 L. ed. 482, 45 Sup. Ct. 11; Alaska Elec. Light &c. Co. v. Juneau, Alaska, 294 Fed. 864, cert. denied in 266 U. S. 601, 69 L. ed. 462, 45 Sup. Ct. 90; Nebraska Gas &c. Co. v. Stromsberg, Nebraska, 2 Fed. (2d) 518; Tulsa, Oklahoma v. Oklahoma Nat. Gas Co., 4 Fed. (2d) 399, dis. in 269 U. S. 527, 70 L. ed. 395, 46 Sup. Ct. 17; Mutual Oil Co. v. Zehrung, 11 Fed. (2d) 887; Pacific Tel. & T. Co. v. Seattle, Washington, 14 Fed. (2d) 877; Dayton, Ohio v. City R. Co., 16 Fed. (2d) 401; Lynchburg Trac. &c. Co. v. Lynchburg, Virginia, 16 Fed. (2d) 763, P. U. R. 1927B, 466; Union Light, Heat &c. Co. v. Railroad Commission, 17 Fed. (2d) 143, P. U. R. 1927C, 489; Idaho Power Co. v. Thompson, 19 Fed. (2d) 547, P. U. R. 1927D, 388; Graff v. Seward, Alaska, 20 Fed. (2d) 816; Denver, Colorado v. Denver Tramway Corp., 23 Fed. (2d) 287; Oregon-Washington Water Service Co. v. Hoquiam, Washington, 28 Fed. (2d) 576; South Porto Rico Sugar Co. v. Munoz, 28 Fed. (2d) 820, P. U. R. 1929B, 629; Central Kentucky Nat. Gas Co. v. Mt. Sterling, Kentucky, 32 Fed. (2d) 338, P. U. R. 1929E, 446; Security Trust Co. v. Grosse Pointe, Michigan, 32 Fed. (2d) 706; Southern California Utilities, Inc. v. Huntington Park, California, 32 Fed. (2d) 868; Florida Public Utilities Co. v. West Palm

Beach, Florida, 36 Fed. (2d) 318, P. U. R. 1930C, 292; Kentucky Power &c. Co. v. Maysville, Kentucky, 36 Fed. (2d) 816, P. U. R. 1930B, 505; Griffin v. Oklahoma Nat. Gas Corp., 37 Fed. (2d) 545; Central Kentucky Nat. Gas Co. v. Railroad Commission, 37 Fed. (2d) 938, P. U. R. 1930B, 225; West Texas Utility Co. v. Spur, Texas, 38 Fed. (2d) 466; Louisville, Kentucky v. Louisville R. Co., 39 Fed. (2d) 822, P. U. R. 1930C, 165; Harris Trust &c. Bank v. Chicago R. Co., 39 Fed. (2d) 958, affd. in 56 Fed. (2d) 942; Chicago v. Harris Trust &c. Bank, 40 Fed. (2d) 612; District of Columbia v. Georgetown &c. R. Co., 41 Fed. (2d) 424; Columbus Gas &c. Co. v. Columbus, Ohio, 42 Fed. (2d) 379, P. U. R. 1930D, 476; Reno, Nevada v. Sierra Pacific Power Co., 44 Fed. (2d) 281; Todd v. Citizens Gas Co., 46 Fed. (2d) 855; Laurel, Mississippi v. Mississippi Gas Co., 49 Fed. (2d) 219; Central Power Co. v. Hastings, Nebraska, 52 Fed. (2d) 487; Corbin, Kentucky v. Joseph Greenspons Sons Iron &c. Co., 52 Fed. (2d) 939; Petroleum Exploration v. Joseph Greenspons Sons Iron &c. Co., 52 Fed. (2d) 944; Campbell, Missouri v. Arkansas-Missouri Power Co., 55 Fed. (2d) 560; Hamill v. Hawkes, 58 Fed. (2d) 41.

Alabama. State v. Birmingham Waterworks Co., 185 Ala. 388, 64 So. 23, Ann. Cas. 1916C, 166; Alabama Water Co. v. Barnes, 203 Ala. 101, 82 So. 115; Mobile v. Mobile Elec. Co., 203 Ala. 574, 84 So. 816, P. U. R. 1921B, 664; Sims v. Alabama Water Co., 205 Ala. 378, 87 So. 688, 28 A. L. R. 461; Alabama Water Co. v. Jasper, 211 Ala. 280, 100 So. 486; Alabama Water Co. v. Attalla, 211 Ala. 301, 100 So. 490; Alabama Trac. Co. v. Selma Trust &c. Bank, 213 Ala. 269, 104 So. 517; Andalusia v. Alabama Utilities Co., 222 Ala. 689, 133 So. 899; Alabama Water Co. v. Anniston (Ala.), 135 So. 585.

Arizona. Bisbee v. Bisbee Improvement Co., 18 Ariz. 126, 157

Pac. 228; Buntman v. Phoenix, 32 Ariz. 18, 255 Pac. 490.

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North Dakota. *Bismarck Gas Co. v. District Court*, 41 N. Dak. 385, 170 N. W. 878, P. U. R. 1919C, 394; *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363; *Olson v. Erickson*, 56 N. Dak. 468, 217 N. W. 841; *Chrysler Light & C. Co. v. Belfield*, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

Ohio. *Zanesville v. Zanesville Tel. & T. Co.*, 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. 725; *Logan Nat. Gas & C. Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122; *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309, 81 N. E. 440; *State v. Burris*, 79 Ohio St. 70, 109 N. E. 591; *Columbus Citizens Tel. Co. v. Columbus*, 88 Ohio St. 466, 104 N. E. 524; *Interurban R. & C. Co. v. Cincinnati*, 93 Ohio St. 108, 112 N. E. 186, P. U. R. 1916F, 998; *Federal Gas & C. Co. v. Columbus*, 96 Ohio St. 530, 118 N. E. 103, P. U. R. 1918D, 68; *Cleveland R. Co. v. Cleveland*, 97 Ohio St. 122, 119 N. E. 202; *Cincinnati v. Public Utilities Comm.*, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705, P. U. R. 1919C, 119; *Cleveland Tel. Co. v. Cleveland*, 98 Ohio St. 358, 121 N. E. 701, P. U. R. 1919C, 136; *Washington v. Public Utilities Comm.*, 99 Ohio St. 70, 124 N. E. 46, P. U. R. 1919F, 365; *Mutual Elec. Co. v. Pom-*

eroy, 99 Ohio St. 75, 124 N. E. 58; Gress v. Ft. Loramie, 100 Ohio St. 35, 125 N. E. 112, 8 A. L. R. 242; Lima v. Public Utilities Comm., 100 Ohio St. 416, 126 N. E. 318, P. U. R. 1920C, 930; Newcomerstown v. Consolidated Gas Co., 100 Ohio St. 494, 127 N. E. 414, P. U. R. 1921B, 669; Local Tel. Co. v. Cranberry Mutual Tel. Co., 102 Ohio St. 524, 133 N. E. 527, P. U. R. 1923A, 396; United Fuel Gas Co. v. Public Utilities Comm., 103 Ohio St. 168, 132 N. E. 845, P. U. R. 1922B, 88, rehearing dis. in 107 Ohio St. 628, 141 N. E. 92; State v. Northern Ohio Trac. & Co., 104 Ohio St. 245, 135 N. E. 528; Wyoming v. Ohio Trac. Co., 104 Ohio St. 325, 135 N. E. 675, P. U. R. 1923A, 408, P. U. R. 1923B, 754; Cleveland & Eastern Trac. Co. v. Public Utilities Comm., 106 Ohio St. 210, 140 N. E. 139, P. U. R. 1923D, 853; United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A. L. R. 342, P. U. R. 1924A, 801; Ohio Elec. R. Co. v. Greenville, 110 Ohio St. 31, 143 N. E. 193; Ohio Elec. Power Co. v. State, 121 Ohio St. 235, 167 N. E. 877; Cincinnati v. Cincinnati & Suburban Bell Tel. Co., 122 Ohio St. 174, 174 N. E. 586; Greenville v. Public Utilities Comm. (Ohio St.), 179 N. E. 131, P. U. R. 1932B, 273; Lake Shore Elec. R. Co. v. State (Ohio St.), 180 N. E. 540; Columbus v. Ohio State Tel. Co., 13 Ohio App. 232, 29 C. D. (39 C. R.) 297, 20 O. C. A. 102, later decision, Columbus v. Public Utilities Comm., 103 Ohio St. 79, 133 N. E. 800; Stuver v. East Ohio Gas Co., 13 Ohio App. 276, 31 O. C. A. 554; Steubenville v. Steubenville, E. L. & C. Trac. Co., 13 Ohio App. 493, 31 O. C. A. 513, motion to certify overruled in 66 Bull. 212, 18 O. L. R. 51; Parks v. Cleveland R. Co., 38 Ohio App. 315, 176 N. E. 472, affd. in Parks v. Cleveland R. Co. (Ohio St.), 177 N. E. 28, P. U. R. 1931E, 321; Ohio Trac Co. v. Huwe (Ohio), 181 N. E. 114.

Oklahoma. Ex parte Piatt, 38 Okla. 572, 134 Pac. 53; Tulsa v. Cor-

poration Commission, 96 Okla. 180, 221 Pac. 1000, P. U. R. 1924B, 767; Huffaker v. Fairfax, 115 Okla. 73, 242 Pac. 254; Western Oklahoma Gas & Co. v. Duncan, 120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277; Oklahoma Gas & Co. v. Wilson, 146 Okla. 272, 288 Pac. 316; Cushing v. Consolidated Gas Utilities Co., 141 Okla. 82, 284 Pac. 38; In re Consolidated Gas Utilities Co. (Okla.), 11 Pac. (2d) 473.

Oregon. Haines v. Eastern Oregon Light & Co., 76 Ore. 402, 149 Pac. 87; Woodburn v. Public Service Comm., 82 Ore. 114, 161 Pac. 391, L. R. A. 1917C, 98, P. U. R. 1917B, 967; Newsom v. Rainier, 94 Ore. 199, 185 Pac. 296; Hillsboro v. Public Service Comm., 97 Ore. 320, 187 Pac. 617, 192 Pac. 390, P. U. R. 1920C, 817; Moss v. Peoples California Hydro-Elec. Corp., 134 Ore. 227, 293 Pac. 606; Fisk v. Leith (Ore.), 299 Pac. 1013, P. U. R. 1931E, 518.

Pennsylvania. Central Germantown Ave. Business Assn. v. Philadelphia Rapid Transit Co. (Pa.), P. U. R. 1917D, 982; Collingdale v. Philadelphia Rapid Transit Co., 274 Pa. 124, 117 Atl. 909; Swarthmore v. Public Service Comm., 277 Pa. 472, 121 Atl. 488, P. U. R. 1923E, 367; White Haven v. Public Service Comm., 278 Pa. 420, 123 Atl. 772; Swarthmore v. Philadelphia Rapid Transit Co., 280 Pa. 79, 124 Atl. 343, 33 A. L. R. 128; Nether Providence Township v. Philadelphia Rapid Transit Co., 280 Pa. 74, 124 Atl. 345; Valley Railways v. Harrisburg, 280 Pa. 385, 124 Atl. 644; Springfield Consol. Water Co. v. Philadelphia, 285 Pa. 172, 131 Atl. 716, P. U. R. 1926C, 321; Reeves v. Philadelphia Suburban Water Co., 287 Pa. 376, 135 Atl. 362; Philadelphia Elec. Co. v. Philadelphia, 301 Pa. 291, 152 Atl. 23; Irwin v. Irwin-Herminie Trac. Co. (Pa.), 152 Atl. 544; Coatesville v. Christiana & Coatesville St. R. Co. (Pa.), 159 Atl. 167; Wilson v. Public Service Comm. (Pa. Super. Ct.), 157 Atl. 497, P. U. R. 1932B, 20.

Rhode Island. East Providence Water Co. v. Public Utilities Comm., 46 R. I. 458, 128 Atl. 556.

South Carolina. Childs v. Columbia, 87 S. Car. 566, 70 S. E. 296, 34 L. R. A. (N. S.) 542; Charleston Consol. Ry. & Co. v. Charleston, 92 S. Car. 127, 75 S. E. 390; Thomas v. Spartanburg R., Gas & Co., 114 S. Car. 74, 103 S. E. 149; Spartanburg v. South Carolina Gas & Co., 130 S. Car. 125, 125 S. E. 295; McKiever v. Sumter, 137 S. Car. 266, 135 S. E. 60; State v. Broad River Power Co., 157 S. Car. 1, 153 S. E. 537, P. U. R. 1930A, 65, writ of certiorari dis. in Broad River Power Co. v. State of South Carolina, 281 U. S. 537, 74 L. ed. 1023, 50 Sup. Ct. 401, P. U. R. 1930C, 234.

South Dakota. Watertown v. Watertown Light & Co., 42 S. Dak. 220, 173 N. W. 739, P. U. R. 1920C, 771; Mitchell v. Board of Railroad Comrs., 44 S. Dak. 430, 184 N. W. 246, P. U. R. 1921E, 750; Lead v. Western Gas & Co., 44 S. Dak. 510, 184 N. W. 244, affd. in 45 S. Dak. 280, 187 N. W. 162; Mitchell v. Mitchell Power Co., 46 S. Dak. 110, 190 N. W. 1013, P. U. R. 1924A, 532; Wagner v. South Dakota Light & Co., 46 S. Dak. 389, 193 N. W. 129, P. U. R. 1923E, 97; Huron v. Dakota Central Tel. Co., 46 S. Dak. 452, 193 N. W. 673; Haines v. Rapid City (S. Dak.), 238 N. W. 145.

Tennessee. Lewis v. Nashville Gas & Co., 162 Tenn. 268, 40 S. W. (2d) 409; Peoples Passenger R. Co. v. Memphis (Tenn.), 16 S. W. 973; Franklin Light & Co. v. Southern Cities Power Co. (Tenn.), 47 S. W. (2d) 86.

Texas. Memphis v. Browder (Tex.), 174 S. W. 982; Athens Tel. Co. v. Athens (Tex.), 182 S. W. 42, P. U. R. 1916D, 796; Fink v. Clarendon (Tex.), 282 S. W. 912; Ft. Worth Gas Co. v. Latex Oil & Co. (Tex.), 299 S. W. 705; Northern Texas Utilities Co. v. Community Nat. Gas Co. (Tex. Civ. App.), 297 S. W. 904, affd. in Community Nat. Gas Co. v. Northern Texas Utilities Co. (Tex.), 13 S. W. (2d) 184; Matlock v.

Dallas Arcadia Fresh Water Supply District No. 1 (Tex.), 14 S. W. (2d) 360; Farmersville v. Texas-Louisiana Power Co. (Tex.), 33 S. W. (2d) 271; Dallas R. & Co. v. Bankston (Tex.), 33 S. W. (2d) 500; Community Nat. Gas Co. v. Natural Gas & Co. (Tex.), 34 S. W. (2d) 900, P. U. R. 1931C, 186; Kennedy v. McMullen (Tex.), 39 S. W. (2d) 168; Corpus Christi Gas Co. v. Corpus Christi (Tex. App.), 283 S. W. 281; Dallas County Free Water District No. 9 v. Connor (Tex. App.), 14 S. W. (2d) 363; Terrell v. Terrell Elec. Light Co. (Tex. Civ. App.), 187 S. W. 966, P. U. R. 1916F, 937; Jones v. Dallas R. Co. (Tex. Civ. App.), 224 S. W. 807; Texas Tel. Co. v. Mart (Tex. Civ. App.), 226 S. W. 497; Malott v. Brownsville (Tex. Civ. App.), 292 S. W. 606; Witty v. Corpus Christi Plumbing Co. (Tex. Civ. App.), 25 S. W. (2d) 169; Tillery v. McLean (Tex. Civ. App.), 46 S. W. (2d) 1028.

Utah. Murray City v. Utah Light & Trac. Co., 56 Utah 437, 191 Pac. 421.

Vermont. Rutland R., Light & Co. v. Burditt Bros., 94 Vt. 421, 111 Atl. 582; Burlington v. Burlington Trac. Co., 98 Vt. 24, 124 Atl. 857; West Rutland v. Rutland R., Light & Co., 98 Vt. 508, 129 Atl. 303, P. U. R. 1926A, 243.

Virginia. Portsmouth, B. & Co. Water Co. v. Portsmouth, 112 Va. 158, 70 S. E. 529; Virginia-Western Power Co. v. Clifton Forge, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148, P. U. R. 1919E, 766; Virginia R. & Power Co. v. Richmond, 129 Va. 592, 106 S. E. 529; Appalachian Power Co. v. Pulaski, 130 Va. 612, 108 S. E. 885; Portsmouth v. Virginia R. & Power Co., 141 Va. 44, 126 S. E. 366; Portsmouth v. Virginia R. & Power Co., 141 Va. 54, 126 S. E. 362; Richmond v. Virginia R. & Power Co., 141 Va. 69, 126 S. E. 353; Lynchburg Trac. & Co. v. Lynchburg, 142 Va. 255, 128 S. E. 606, 43 A. L. R. 752; Ex parte Norfolk R. & Co., 142 Va. 323, 128 S. E. 602, P. U. R. 1926A, 98; Hampton v.

§ 124. Franchise confers special privilege.—The case of *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818, decided in 1894, expressed the principle in the following language: "The franchise is a special privilege, not belonging as of common right to the people at large. It is an executed contract, the consideration for which is the benefit which the public will derive from its use and exercise. The common council is authorized by the statute to grant such franchises, and they are as much the franchises of the corporation as if granted by an express statute, for the

Newport News &c. R., Gas &c. Co., 144 Va. 24, 131 S. E. 380; *Hampton v. Newport News &c. R., Gas &c. Co.*, 144 Va. 29, 131 S. E. 328; *Virginia R. & Power Co. v. Norfolk*, 147 Va. 951, 133 S. E. 565; *Mt. Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355; *Roanoke R. & Elec. Co. v. Brown*, 155 Va. 259, 154 S. E. 526.

Washington. *Doland v. Puget Sound Trac., Light &c. Co.*, 72 Wash. 343, 130 Pac. 353; *State v. Public Service Comm.*, 83 Wash. 130, 145 Pac. 215; *State v. Olympia Light &c. Co.*, 91 Wash. 519, 158 Pac. 85; *State v. Home Tel. & T. Co.*, 102 Wash. 196, 172 Pac. 899; *Seattle v. Puget Sound Trac., Light &c. Co.*, 103 Wash. 41, 174 Pac. 464, P. U. R. 1919A, 880; *State v. Superior Court*, 110 Wash. 396, 188 Pac. 404, P. U. R. 1920D, 403; *Monroe Water Co. v. Monroe*, 135 Wash. 355, 237 Pac. 996; *Puget Sound Power &c. Co. v. Seattle*, 142 Wash. 580, 253 Pac. 1083; *Burkheimer v. Seattle (Wash.)*, 299 Pac. 381; *Wylde v. Seattle (Wash.)*, 299 Pac. 385.

West Virginia. *Bluefield Waterworks &c. Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; *St. Marys v. Hope Nat. Gas Co.*, 71 W. Va. 76, 76 S. E. 841, 43 L. R. A. (N. S.) 994; *Wheeling v. Chesapeake & Potomac Tel. Co.*, 82 W. Va. 208, 95 S. E. 653, P. U. R. 1918F, 403; *Charleston v. Public Service Comm.*, 86 W. Va. 536, 103 S. E. 673, P. U. R. 1920F, 823; *Marmet Gas Co. v. Marmet*, 102 W. Va. 605, 139 S. E. 839.

Wisconsin. *Ashland v. Wheeler*,

88 Wis. 607, 60 N. W. 818; *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023; *Milwaukee Elec. R. &c. Co. v. Railroad Commission*, 153 Wis. 592, 142 N. W. 491, L. R. A. 1915F, 744, Ann. Cas. 1915A, 911; *Milwaukee v. Milwaukee Elec. R. &c. Co.*, 156 Wis. 83, 144 N. W. 206; *Wisconsin Trac., Light, Heat &c. Co. v. Menasha*, 157 Wis. 1, 145 N. W. 231; *State v. Oconto Elec. Co.*, 165 Wis. 467, 161 N. W. 789, P. U. R. 1918D, 68; *Oshkosh v. Eastern Wisconsin Elec. Co.*, 172 Wis. 85, 178 N. W. 308; *State v. Braman*, 172 Wis. 131, 178 N. W. 301; *Milwaukee Elec. R. &c. Co. v. Milwaukee*, 173 Wis. 329, 181 N. W. 298, P. U. R. 1921D, 310; *West Allis v. Milwaukee*, 180 Wis. 512, 193 N. W. 360, P. U. R. 1923E, 584; *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926D, 290; *Walworth v. Chicago, Howard &c. R. Co.*, 190 Wis. 879, 208 N. W. 877; *Central Wisconsin Power Co. v. Wisconsin Trac., Light, Heat &c. Co.*, 190 Wis. 557, 209 N. W. 755, P. U. R. 1927A, 76; *Madison v. Railroad Commission*, 199 Wis. 571, 227 N. W. 10, P. U. R. 1930A, 499; *Milwaukee v. Milwaukee Elec. R. &c. Co. (Wis.)*, 237 N. W. 64; *Union Co-op. Tel. Co. v. Public Service Comm. (Wis.)*, 239 N. W. 409, P. U. R. 1932B, 269; *Milwaukee v. Railroad Commission (Wis.)*, 240 N. W. 165, P. U. R. 1932B, 339; *South Shore Utility Co. v. Railroad Commission (Wis.)*, 240 N. W. 784, P. U. R. 1932B, 465; *Wisconsin Tel. Co. v. Public Service Comm. (Wis.)*, 240 N. W. 411, P. U. R. 1932B, 195.

common council exercise in granting them a delegated authority, and what it does within that power is done by the legislature through its agency. The acceptance of the conditions of the grant by the water company beyond doubt constituted a valid contract between it and the city. There is no provision in the statute delegating to the common council of the city the power to alter or repeal a grant of such franchise, though, through the exercise by the legislature of the reserved power in section 1, article 2, of the Constitution, it might alter or repeal it at will. In the absence of an express delegation to the common council, we think none can be implied. It was therefore beyond the power of the common council to alter, repeal, or impair in the least the franchise or contract in question, and the ordinance upon which this prosecution is founded is therefore clearly void."

While franchise rights confer special privileges, they also carry conditions and obligations which the public utility accepting them can not avoid, nor does their enforcement constitute the taking of property without compensation, as is clearly indicated in the case of *West Rutland v. Rutland R., Light & Power Co.*, 98 Vt. 508, 129 Atl. 303, P. U. R. 1926A, 243: "The rule established by the cases cited is that, by accepting a charter, the grantee consents to be bound by all the provisions and conditions, and the corporation can not complain of the enforcement of any of them. To the enforcement of these, the question of taking property of the corporation without compensation does not apply."

§ 125. Conditions of special franchise imposed by municipality binding.—The case of *Bluefield Waterworks & I. Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759, decided in 1911, furnishes an interesting discussion of the exercise by the municipality of the power delegated to it by the state to regulate a municipal public utility by showing that it was essential to obtain such municipal consent subject to the terms and conditions imposed as the condition of granting it, but that when the consent thus obtained was accepted by the company the contract was formed and the rights of the parties became vested, including those of the inhabitants of the city for whose benefit the contract was made. The court said: "This corporation, chartered by the state, could not obtain the right to occupy the streets of the city or do business therein under its state franchise, without the consent of the city. In order to obtain that consent, it was bound to submit itself to such regulatory conditions as the city saw fit to impose. When these conditions

were imposed and accepted by the company, the prescription and acceptance thereof formed a contract between the city and the company.⁶ The power thus conferred upon the company to occupy the streets and do business is not revocable, except for breach of the contract in some form by the company. It is a contract fully protected by the constitutional guaranties, and immune from destruction or impairment by the city. The contractual relation extends not only to the immediate parties, the city and the company, but also to the inhabitants of the city. It confers upon them rights which the company can not withhold or deny, and also upon the company rights which the city can not destroy. The rates prescribed by the contract, if any, and the remedies for the enforcement thereof, left in the hands of the company, such as rules and regulations, form parts of the contract.⁷ Of course, the rates and method of doing business are subject to regulation to some extent by the state, under its general police power, but not by the city; the state not having delegated to it power to make such regulations. In its use of the streets and its general conduct it is subject to such regulations as the city may make under the police powers delegated to it; but these do not extend to rates and terms of contract. The function performed by a municipal corporation in securing rates and guaranties of modes of transacting business between itself and public utility corporations seems to rest upon its contractual, not its legislative, capacity."

Where the franchise provided for a payment of the percentage of the gross receipts arising from its use, the provision will be enforced, although the system operates beyond the limits of the municipality, by segregating the system and separating the receipts arising from its operation within the city from those without, as is shown in *Tulare County v. Dinuba*, 87 Cal. App. 744, 263 Pac. 249, where the court said: "The second group of facts found, however, is to the general effect that the system of franchise lines serving the city of Dinuba is capable of segregation and separation from the system as a whole, from which it results that the city of Dinuba system may feasibly be considered and treated as a separate unit of the franchise rights. * * *

⁶ *Clarksburg Elec. Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; *Railroad Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499.

⁷ *Detroit, Michigan v. Detroit Citizens St. R. Co.*, 184 U. S. 368, 46

L. ed. 592, 22 Sup. Ct. 410; *Knoxville Water Co. v. Knoxville, Tennessee*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531; *Cleveland, Ohio v. Cleveland Elec. R. Co.*, 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. 513.

There is no dispute and no appeal concerning the amount due from the company to the county as a whole (including Dinuba). The company paid into court the sum of \$4,546.94 for the year 1923 and \$15,074.34 for the years up to and including the year 1922. * * * The amount of franchise tolls awarded to the city of Dinuba apparently is not in excess of 2 per cent of the gross receipts arising from the use of the franchise lines within the boundaries of said city, and the method of determining the amount thereof is in harmony with the opinion in the appealed case."

Where the franchise contains no stipulation as to whether gas will be natural or artificial and the company later introduces natural gas and in doing so passes its pipes through other cities which granted similar franchises, the percentage of receipt payments to any particular municipality must be determined by segregating the amount of gas sold in that municipality. This principle is enunciated again in the case of *Monrovia v. Southern Counties Gas Co.* (Cal.), 296 Pac. 117, as follows: "The franchise contains nothing more than the usual grant to use the public streets for the purpose of laying gas pipes. There is nothing in the franchise relating to the character of gas to be furnished or to the method or place of production. When the appellant changed from the artificial to natural gas, to the great benefit of the consumers, it, of course, became necessary to install transmission pipes to bring that gas to the city limits. These pipes necessarily passed through other cities and counties from which similar franchises were necessary. The receipts collected for the sale of gas within the city of Monrovia arose in part from appellant's franchise within the city and in part from its properties and rights of way outside the city. This is a feature which the trial court did not take into consideration in its judgment. It is an essential part of the method of allocation approved by the Supreme Court in the *Tulare* case, hence further discussion is unnecessary."

The provisions and conditions of a franchise contract, providing for the moving and relocating of conduits and tracks of a street railway company when this is required for municipal improvements, are binding on the company and will be enforced by the court without any compensation to the company in the interest of the public welfare and in accordance with the provisions of the contract. This principle is enunciated as follows in the case of *Philadelphia Electric Co. v. Philadelphia*, 301 Pa. 291, 152 Atl. 23: "The city had entered upon the construction,

at great expense, of a most extensive subway improvement in one of its prominent thoroughfares. In the course of construction of this municipal enterprise it was found that conduits of plaintiff, as then located, hindered and prevented the proper completion of the project, intended for public use. The shifting and re-laying of the structures was a matter of pressing and immediate public concern. Hindrance and delay in the construction by reason of the location of plaintiff's property meant not only increased cost to the city, but also a serious public inconvenience and that such continued incompleteness, or an improper completion, would unquestionably amount to nothing less than jeopardy to public safety. Before these imposing public necessities, private rights may not stand as a barrier; and in the present instance the conduits were subject to the regulatory control of the municipality under its police power, *Springfield Consol. Water Co. v. Philadelphia*, 285 Pa. 172, 175, 181 Atl. 716; *Pittsburgh v. Gas Company*, 34 Pa. Super. Ct. 374; and, by its acceptance of the provisions of the ordinances and rules and regulations governing its right to enter upon and use the streets, plaintiff was obligated to defray the cost of moving and re-laying its conduits and other property in accordance with the principle set forth in many declarations of this court. * * * The kind and range of the conditions imposed by the municipality were within the discretion of its executive and administrative officers, and it has long been an established principle of law that the court, except in cases of manifest abuse of discretion, will not substitute its judgment for that of the body to whom the parties committed the right of imposing conditions. * * * The franchise, and not the particular location, is the essence of the contract, and the city under its power to regulate might compel, for instance, a railway company to remove its tracks from the center to the side, or from the side to the center of the street. * * * Subject to the paramount authority of the commonwealth, the regulation and control of the streets, which are the great highways of the city, belong to the city government. * * * In the present case plaintiff's conduits were removed and re-laid at its expense in accordance with its contract with the city, a contract concluded previous to the entry upon and use of the streets by the company. There was no appropriation or destruction of its property. The shifting and re-laying were upon the land of the municipality and were plainly necessary for the public welfare. It has long been an established doctrine that a city can not be required to compensate the plaintiff for

obeying lawful regulations enacted for the safety of the lives and the property of the citizens."

§ 126. **Power of inhabitants to enforce franchise provisions.**—The case of *Portsmouth, B. & S. Water Co. v. Portsmouth*, 112 Va. 158, 70 S. E. 529, decided in 1911, indicates that the obligations of the contract are imperative and that its privileges are available to the inhabitants and their performance will be enforced by the courts upon proper application. The court in the course of its decision spoke as follows: "By the terms of its contract with the city, it had the exclusive privilege of using the streets of the city for the purpose of furnishing water to it and its inhabitants. The duty of furnishing water for sewerage purposes for the fifth ward of the city was one which it owed in effect to the city, and a refusal to make the tapplings and connections in question was a refusal to furnish water for sewerage purposes in that part of the city. If this duty had been imposed by the provisions of the charter of the water company or by an ordinance of the city, under our decisions there could be no question that it was a public duty, and its performance, in a proper case, could be enforced by mandamus.⁸ The ordinance of a city prescribing the terms and conditions upon which a water company may lay its mains and pipes in the streets of the city and furnish water to it and its inhabitants, when accepted by the water company, constitutes the contract between the city and the water company. Where the obligation on the water company is the same, it would seem to be of little consequence whether the contract between the city and the water company be in one form or in the other, as to the right to compel the performance of the duty by mandamus."

While franchise rights granted to public utilities are generally available to the inhabitants, they may not raise the question of regulation by insisting on one-man street cars because this is held to be within the control of the municipal authorities in the exercise of the police power and where they have failed to regulate the question, the individual will not be permitted to do so, for as the court said in the case of *Des Moines City R. Co. v. Amalgamated Assn.*, 204 Iowa 1195, 213 N. W. 264: "That the city, in the first instance, has the right and power to designate whether or not these street cars shall be operated by one man, or two or more men, has been put beyond the realm of dis-

⁸ *Richmond R. &c. Co. v. Brown*, Va. 661, 66 S. E. 835, and authorities cited.
97 Va. 26, 32 S. E. 775; *Vinton-Roanoke Water Co. v. Roanoke*, 110

pute. * * * It is thus settled that the city, in the exercise of its police power, has the absolute right to regulate this question by ordinance, and in the instant case the city has reserved to itself this power. * * * In the instant case, the city has not exercised such power. So long as the city has not exercised such power, we know of no law which will prevent the company and the associations from making such contracts relative to this matter as they may see fit. The general public is not a party to the action. Its interests are presumed to be looked after and taken care of by the city, but the city is not a party to this action. So it must follow that the question of public interest is not to be considered as an element of this case. * * * That as to the contract being against public policy because it unionizes an entire industry, and also because it requires a motorman and a conductor on each car while in operation, these questions are not properly before us as the matters pleaded do not warrant the intervention of a court of equity."

§ 127. **Special franchise necessary to use of general franchise.**—The rule that when it is necessary to secure the consent of the municipality, such consent is a condition precedent to the practical enjoyment of the right to be a corporation, which is of no value without the right to install and maintain its plant, is well expressed by the decision of *Peoples Passenger R. Co. v. Memphis* (Tenn.), 16 S. W. 973, decided in 1875, in the following language: "By the fourth section of the act incorporating the 'Peoples Passenger Railroad Co. of Memphis' it had authority to operate street railways by animal power on all the streets of Memphis, 'with the consent of the said city.' It was conclusively settled by the Supreme Court of this state and of the United States in the cases of *Memphis City R. Co. v. Mayor*, etc., 4 Cold. (Tenn.) 406, 413, 416, and *Peoples Passenger R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38-55, that the said corporation, the 'Peoples Passenger Railroad Co. of Memphis,' never procured or obtained the city's consent to its use of any of the streets for the purpose of operating street railways thereon, as provided by the fourth section of the act of incorporation, and by the resolution of the board of mayor and aldermen, when permission was given for Small and his associates to procure said act. * * * The legal effect of the city's withholding or refusing its assent to said corporation's use and occupation of the streets was to render the grant conferred by the act of incorporation inoperative and useless to the individual promoters."

§ 128. Franchise rights of inhabitant and nonresident distinguished.—But while the right to enjoy the conveniences of municipal public utilities provided for by the municipality in its franchise is generally held to be available to the inhabitants of the municipality, these privileges are not available to nonresidents, as was stated in the case of *Childs v. Columbia*, 87 S. Car. 566, 70 S. E. 296, 34 L. R. A. (N. S.) 542, decided in 1911, where the court spoke as follows: "This action was brought by W. G. Childs to enjoin the city of Columbia from cutting off his water supply or charging him a water rate alleged to be exorbitant, discriminatory, and unreasonable. * * * The plaintiff lives outside of the city, but the city agreed about ten years ago to furnish water for his residence and other houses occupied by others as residences, but belonging to plaintiff, also beyond the corporate limits 'at the customary and usual price.' * * * Assuming the correctness of this position, it does not by any means follow that the city occupied towards the plaintiff, a nonresident, the relation of a public service corporation, under obligation to contract with him for his water supply at a reasonable rate, without discrimination. All powers and privileges conferred by the constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries, and for the benefit of the inhabitants of the municipality. * * * Assuming that the city authorities had the power to contract with the plaintiff to furnish water for his residence and other houses, and that the duty devolves on them of contracting for the sale of any excess of the city's water supply beyond the municipal needs and the need of its inhabitants, it is, nevertheless, perfectly obvious that the duty to sell the excess of its water supply did not import an obligation to make a contract with any particular person at a reasonable price; but, on the contrary, did import an obligation to sell its surplus water for the sole benefit of the city, at the highest price obtainable. * * * It follows that the plaintiff, as a mere nonresident, had no rights whatever against the city, except such as he may have acquired by contract."

Where the municipality is operating its own waterworks and incidentally selling its surplus supply to nonresidents, the court will not interfere with such action unless it handicaps the municipality in serving its inhabitants, and where this question is raised the public service commission is required to pass upon its merits in the first instance, according to the decision in the case of *Speas v. Kansas City (Mo.)*, 44 S. W. (2d) 108, where

the court said: "In other words, if Kansas City acquired and is operating its waterworks primarily for the purpose of supplying water for its own needs and the needs of its inhabitants, and is incidentally selling surplus water to nonresidents, without impairing the usefulness of its waterworks for said primary purpose, such exercise of its charter power to supply water to nonresidents is not inconsistent with its charter power to acquire and to operate waterworks for public purposes only, nor with the constitutional provision that taxes may be used for public purposes only. * * * It is alleged that the action of the city in supplying water to nonresidents has resulted, and will continue to result, in an inadequate supply of water for the use and protection of its inhabitants, and that the city is discriminating against its inhabitants and in favor of nonresidents in water service and in water rates, in violation of section 1 of amendment 14 of the Constitution of the United States, which says no person shall be deprived of property without due process of law, nor denied equal protection of the laws. Complaints of this character must be heard and passed on first by the public service commission."

§ 129. **State control of municipal franchise grants.**—As the power to grant the necessary franchise rights to be a body corporate as well as to use and enjoy the rights thereby conferred by operating a public utility plant resides in the state, the legislature acting for the state may delegate the power to the municipality to impose certain conditions in connection with the exercise of such rights and provide that in the event the municipality and the corporation are unable to agree, the matters in dispute may be decided by such court as may be designated. This application of the general principle is well illustrated in the case of *Zanesville v. Zanesville Tel. & T. Co.*, 64 Ohio St. 67, 59 N. E. 781, decided in 1901, to the following effect: "It is competent for the state, through its legislative department, to grant to telephone and telegraph companies organized under its authority the right to construct their lines in the streets of municipalities, and in the present instance the grant was so made. The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for that purpose practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 of the Revised Statutes. * * * The necessity for the existence of some tribunal authorized to hear and determine disagreements between municipalities and telephone

companies with respect to the mode of construction of the companies' lines in the public streets is apparent, not only for the protection of the rights of the respective corporations, but also in the public interest, as conservative of peace and good order, and in securing to the public the full benefit of the service such companies are designed to afford, at those reasonable rates which always attend fair competition, and the best consideration we have been able to give this case has failed to satisfy us that the power conferred on the probate court by the statutory provision in question has been inappropriately bestowed."

§ 130. **Power of municipality to regulate.**—The case of *Wright v. Glen Tel. Co.*, 112 App. Div. 745, 99 N. Y. S. 85, decided in 1906, indicates that while the power delegated to the municipality is generally liberally construed in favor of the municipality, where such statutory power consists simply in defining the police power in connection with regulating the installing of the plant, the city can not regulate the service to the extent of absolutely fixing the rates therefor. In so deciding the court said: "Plaintiff's contention, that he is entitled to service upon the terms stated in the so-called franchise given to the defendant from the city of Gloversville, is, we think, not sound. The right to construct its line along and upon the highways is given by the statute. By section 41, ch. 275, p. 533, of the Laws of 1899, the municipal authorities of the city of Gloversville are only given the right 'to regulate the setting and stringing of telegraph, telephone, electric light and power, and other poles and wires in said city.' The power of the municipality is simply a police power, to be exercised for the protection of the citizens. It can not use that power for the purpose of forcing a contract with a telephone company for benefits to itself or to the citizens. * * * In fact, it can make no contract with the company which could not be altered by a subsequent municipal council if necessary for the protection of the citizens. If this be sound law, the franchise can in no way be a contract binding upon the defendant as to compensation for service for lack of consideration."

That the power which the state delegates to the municipality is subject at all times to the control of the state and that the municipality can not exercise any power inconsistent with that delegated to it nor in any way interfere with the power reserved to the state are well illustrated by the case of *In re Kings County Elevated R. Co.*, 105 N. Y. 97, 13 N. E. 18, decided in 1887, where the court made the following statement of this principle:

"The statute determines how the damages of the landowner shall be ascertained, and confers upon the commissioners sole power and jurisdiction to determine when the various portions of the road shall be completed. Their action is as the action of the legislature, and can neither be superseded nor in any way affected by that of any other body. But here the resolution of the common council is wholly repugnant to the statute in one case, and to the condition imposed by the commissioners in the other. The statute requires the appointment by the Supreme Court of commissioners of appraisal, defines the mode of procedure, and gives effect to their decision, both as respects the company and the landowner. The common council requires the company to consent, at the option of the landowner, to have his damages ascertained by the assessors for the city, and to abide by their decision as to damage or injury, including depreciation in value to any property abutting upon and along the line of the road. These two schemes are inconsistent and can not stand together. * * * The power to recall a consent is not given by the act of 1875, neither can it by the operation of any cause set on foot by the local authorities, when once given, be annulled."

In the case of Paducah, Kentucky v. Paducah R. Co., 261 U. S. 267, 67 L. ed. 647, 43 Sup. Ct. 335, P. U. R. 1923C, 309, the court said: "That the city had power under its charter to prescribe just and reasonable fares from time to time was stated by counsel on the argument and is assumed. The surrender of this power or any part of it is a very grave act; authority to make it must be plain, and the intention so to do must clearly and unmistakably appear. * * * The conclusions to be drawn as to the matter in controversy are obvious. The parties agreed to and were bound to the specified fares for the first twelve months. These fares were not agreed to be maximum for any other part of the franchise term. The right of the company thereafter to have fares sufficient to provide a reasonable rate of return upon its invested capital was not contracted away. The power and duty of the city thereafter to prescribe fares that are just and reasonable were not contracted away; it was definitely understood that if, from any of such reports, it appears that the fare as fixed (meaning, as established and in effect) was excessive the city will reduce such fare accordingly. We have examined the record and are satisfied that the fares prescribed by the ordinance of September 21, 1920, were shown to be too low under the conditions existing at the time of the trial, and that the

company is entitled to the injunction. The decree entered is general in form and is not limited as to time. The terms of the ordinance prescribing the fare in question are general and fix no time limit. It is obvious that conditions may have so changed, or hereafter may so change, that these or even lower fares may be just and reasonable. The decree appealed from should be modified to safeguard the right of the city under its charter and the franchise properly to exercise its power to prescribe just and reasonable fares."

The general application of this principle of the strict construction of the power of municipalities to bind themselves by rate contracts and the reason on which it is based is well stated in the well-reasoned decision of the case of *Ansonia v. Ansonia Water Co.*, 101 Conn. 151, 125 Atl. 474, as follows: "The Supreme Court of the United States has often held that the rightful exercise of the power of the state to regulate rates charged by public service corporations can not be forestalled by contracts between such corporations and their customers, attempting to fix rates in advance, for a term of years. * * * Examination of the authorities referred to, so far as they are relevant, shows that the exception is narrowly confined to cases in which it clearly and unmistakably appears, first, that the state has delegated its rate-regulating power to the municipality, acting within its geographical limits, and, second, that the municipality has with equal clarity and certainty exercised its delegated power by a contract fixing the rate to be charged for a limited term. * * * The second class includes the so-called 'franchise contract' cases, in which the municipality, being explicitly authorized to grant franchises conferring upon persons or associations the right to use its streets for laying water pipes, gas pipes, or street railway tracks, has by ordinance, accepted by and acted upon by a public service corporation, and so having the force and effect of a contract, granted a franchise specifying the maximum rates to be charged for the service to be rendered for a given term. These cases illustrate the solicitude with which the Supreme Court resolves all doubtful cases in favor of the continuance of the rate-regulating power. The root of the matter is that the rate-regulating power of the state is a limitation on the right to fix rates by private contract, and that therefore the rightful exercise of that governmental power can not be said to impair the obligation of such contracts."

While it is generally recognized that municipalities have the right to control their streets and to grant franchises to public

utilities under certain conditions, including the making of a charge in the nature of an inspection fee, the right to regulate rates is generally recognized as a continuing one in the state, and a provision of the franchise on this subject may be modified or canceled by the state to meet changed conditions, as is indicated in the case of *Lewis v. Nashville Gas & Heating Co.*, 162 Tenn. 268, 40 S. W. (2d) 409, as follows: "The control of streets and highways, primarily in the state, could be vested in the state's subordinate agencies, the municipalities and counties. That was done under acts incorporating the city of Nashville through chapter 114, Acts of 1883, and subsequent amendatory acts. * * * The legislature withheld the power from the gas company to enter the city and made entry dependent upon consent of the city. * * * But the regulation of rates, however accomplished, was subject to the continuing police power of the state which, in the exercise of its sovereignty, could cancel the conditions that had permitted the municipality to prescribe rates. * * * The provisions of sections 8 and 9 of Ordinance 155 became nugatory upon resumption by the state of the power to regulate rates by chapter 49, Acts of 1919. In order to meet changed conditions, the state probably could have suspended the contract embodied in section 14 of Ordinance 155, but it was not done. * * * The charge that the annual payments which the gas company agreed to make in consideration for the franchise and the right to lay its pipes under the city streets was a tax or an inspection fee would not make it so. The fact that the city obtained money which it could use as revenue does not determine the character of the charge or make it a tax. * * * The court is without authority to annul a valid contract as a means of reducing rates to the consumers of gas. That the contract embraces receipts for gas consumed by persons beyond the city limits would not authorize an attempted allocation of receipts from gas consumers within the city as the basis for the annual payments which the gas company agreed to make. The earnings are necessarily dependent upon the franchise granted by the city, which could not be exercised without using the streets. * * * Now the rate is regulated through the railroad and public utilities commission."

Where the statutory power to deny a franchise to a telephone company is limited expressly to cases where the lines of such company would interfere with public travel on the highways, a municipality may not refuse to grant a franchise, because the public needs were being met by an existing telephone system. In

so holding, the court said in the case of Northern Kentucky Mutual Tel. Co. v. Bracken County, 220 Ky. 297, 295 S. W. 146: "The fiscal court did not base its refusal to offer the requested franchise on any ground that the proposed telephone line would interfere in the slightest with public travel in and along the highways involved, but solely on the ground that the existing telephone system was sufficient for the needs of the county. We are unable to find in the statutes any authority for the fiscal court to refuse the desired franchise on this ground. Section 4679d1 when read in the light of the sections of the statute vesting the power over the county roads and bridges in the fiscal court undoubtedly requires the fiscal court to offer the requested franchise unless the erection of such a telephone line would, in the judgment of the fiscal court based on the exercise of its sound discretion, interfere with public travel along the highways. No such interference appears here. * * * And so here, while we can not tell the fiscal court on what terms and conditions it should offer the requested franchise, we may require it to offer a franchise on such terms and conditions as seem fit to it."

This same court also held that all public utilities operating within a municipality are required to obtain a franchise, regardless of the nature or extent of their equipment or the use they may make of the streets and highways. The court held that the character of the service furnishes the test, in the case of Peoples Transit Co. v. Louisville R. Co., 220 Ky. 728, 295 S. W. 1055, P. U. R. 1927E, 552: "The dominant thought running throughout that opinion was and is that any such public utility operated in a city with contemplated permanency is required to obtain a franchise as prescribed by section 164 of the Constitution. * * * To hold otherwise would be tantamount to saying that a franchise is not required except in cases where it becomes necessary to erect upon, under, or over the streets and alleys of the city some sort of fixed structure, howsoever insignificant it might be. We can not conceive that a constitutionally declared purpose, as is incorporated in section 164 of the Constitution, should be made to turn upon such a trifling, shadowy, and unimportant fact. On the contrary, we prefer to believe that it was the intention and purpose of the constitutional delegates, as well as this court in its opinion in the Hilliard case, to test the requirements of the section by the character of service to be rendered, which are the produced results, regardless of

the means or facilities that may be employed in the accomplishment."

Where the municipality has the power to regulate rates of public utilities, it is required to do so in the interest of the public service and to prevent ruinous competition, as well as unjust charges, either to the consumers or to the public utility itself, as is indicated in the case of *Community Nat. Gas Co. v. Natural Gas &c. Co.* (Tex. Civ. App.), 34 S. W. (2d) 900, P. U. R. 1931C, 186, where the court said: "The power of the legislature to regulate rates of public service utilities and the incident power of delegating such power to other governmental agencies is too well settled in our jurisprudence to require citation of authority. Wherever the question has arisen, this power has been construed as extending, not only to the fixing of maximum, but also of absolute rates. * * * The power of the legislature to delegate to municipalities this authority may now be regarded as elementary. In *Uvalde v. Electric Co.* (Tex. Com. App.), 250 S. W. 140, it was held that a city could not by contract barter away its governmental function of rate making; and, further, that the authority vested in cities under R. S., article 1119 was not merely permissive, to be exercised or not as the city might choose, but was imposed as a duty which the city was legally obligated to perform. * * * The city could not make rates for one corporation which were higher or lower than the rates made for another corporation for the same services to the same patrons in the same territory that would be legally binding as fixed rates. This the city does not appear to have attempted to do. All that it did, as we interpret the several franchise ordinances, was to fix maxima for each corporation, leaving them free to compete in the matter of rates within the maxima. It follows from what we have said that the injunction which prohibited the Community Company from making rates lower than those fixed in its franchise as maxima, while the fuel company was operating under lower rates in the same territory, was improperly granted. * * * The judgment did not specifically enjoin the thirty-five-cent rate, but enjoined any rate below the Community Company's maxima. In legal effect it was mandatory, compelling appellant to maintain its franchise rates as fixed and not as maxima. The judgment is therefore necessarily based upon the proposition that, under the Community Company's franchise and R. S., article 1119, it could not make rates below the maxima without further authority from the city. Rate making is a legislative, not a judicial, function. * * *

The controversy between the two competing corporations is one which addresses itself in the first instance to the city of Brownwood, and not to the courts. Under the holding in the Uvalde case the city is not only vested with the power, but is charged with the duty of fixing just and reasonable rates, both in the interest of the contending utilities and in that of the consumers. As was said in *Economic Gas Co. v. Los Angeles*, 168 Cal. 448, 143 Pac. 717, 718, Ann. Cas. 1916A, 931: 'It is contended that the city's police power extends only to the protection of the consumer. But "regulation" involves more than that. It includes the power to prevent ruinous competition among the producers as well as unjust charges to the consumers.'

Where rates were fixed in a ferry franchise by the municipality acting with proper authority but no rates were provided for automobiles, which came into use after the franchise was granted, and a provision of the franchise was to the effect that rates not fixed by its terms should be determined by agreement or by arbitration in the event of the failure of the parties to agree, the court, in holding that fixing rates is a legislative function of the municipality, refused to permit them to be determined by arbitration and required the municipality itself to fix the rate. In establishing this principle in *McNeeley v. Vidalia*, 157 La. 338, 102 So. 422, the court said: "In 1902 the town of Vidalia granted to plaintiff a franchise for a ferry across the Mississippi river, to run for 20 years from March, 1906. The rates were fixed on most articles, but not on automobiles which had not then come into general use. It was provided, however, that rates not fixed in the grant should be fixed by agreement, otherwise by arbitration. * * * Suffice it to say that in this case the town council is not seeking to alter the contract except in so far as the same provides that as to rates not fixed in the franchise they shall be fixed by agreement or arbitration. And as to that we are satisfied that the action of the town council was ultra vires and void. For whether such rates be fixed by contract or otherwise, they are manifestly compulsory so far as they affect the public, who must either pay the rates fixed or go without. And since public utilities are for all practical purposes public necessities, and virtual monopolies, it follows that the rates fixed for such necessities are in effect a tax upon the public for such public service. In this state a ferry is made a monopoly by law. Act 68 of 1896, p. 101. The fixing of such rates is therefore essentially a legislative function; and being such it can not be made a matter of arbitration, since to

make it such is simply to delegate to arbitrators the power to fix such rates; and this can not be done. * * * On the other hand, an agreement to agree is no agreement at all, since either party may avoid it by mere failure to agree. Since the agreement to agree was vain, and the agreement to arbitrate was void, it follows that either plaintiff might charge what he pleased upon automobiles transported over his monopoly, or that the town council had the right to fix the rates; for there was in 1902 no public service commission authorized to fix ferry rates. And it would seem that the question whether plaintiff or the town council had the power to fix the rates ought to answer itself, since an unbridled monopoly of a public necessity would be an anomaly under a free, not to say a civilized, government. * * * From this it follows either that ferries within the control of municipal corporations shall be subject to no control whatever as to the rates which they might charge for ferriage, or that such rates are subject to the control of the municipalities. But can it be supposed for a moment that the legislature meant to provide that ferriage tolls should be subject to regulation in the sparsely settled rural communities, but not subject to regulation in populous urban communities; that our solons were straining at gnats and swallowing camels? Hence it can not but be that the right to establish a ferry (meaning thereby an exclusive privilege) carries with it necessarily the right to fix the rates. But if the right to fix the rate exists in the municipality, how is that right to be exercised. * * * Our conclusion is that ferries under the control of municipalities are subject to regulation by the governing authorities of such municipalities as to all rates and tariffs not established by the franchise itself. * * * The right (if any) of a municipal corporation to fix the rates for a public service rendered to its inhabitants does not come from the inherent power to contract, but from the police power."

While a municipality is permitted to exercise a wide discretion in the regulation and control of public utilities operating under franchises, the courts will not permit an unreasonable exercise of such power; and where the municipality attempts to prevent the furnishing of natural gas in lieu of artificial gas, the court will enjoin such action in the absence of any sufficient evidence that the substitution will not be equally if not more desirable than the former service. This principle is established and discussed at length as follows in the case of *Central Power Co. v. Hastings, Nebraska*, 52 Fed. (2d) 487: "The real question of great importance is whether the plaintiff's franchise con-

fers the right to substitute natural gas. * * * As the natural gas which the plaintiff proposes to furnish the city is a 'gas,' and gives a heating value of much more than 600 British thermal units, there is nothing in the words of the franchise or in the ordinary meaning of the words to hinder the plaintiff from furnishing natural gas. * * * It is well settled that a franchise when ambiguous must be construed strictly for the grantor, that is, the people, and privileges not unequivocally granted are withheld. * * * It seems to me that it was not in the mind of either the legislature of Nebraska or the city of Hastings that there was anything desirable in having a gas works in the city—some of them had been found nuisances *per se*—but the desirable thing in mind was the gas with its heat value. Accordingly I consider that the desire to obtain the gas with its heat value was the inducement for both the legislative enactment and the franchise. As no natural gas was available or within any reasonable prospect of becoming available, it was thought that the right to erect gas works had to be accorded to accomplish the end of getting the gas. But there is nothing in the statute to even remotely suggest that, if the franchised company could get the gas without making it in a gas plant, there should be any restraint upon so doing. The argument for the city goes to the extent that, under the statute and on account of the reference therein to 'gas works,' none of the cities in the state of the class of Hastings have any power to have natural gas furnished its inhabitants under any franchise. The interpretation appears to me unreasonable. * * * In practically every contract some things are necessarily implied and the canons of interpretation of franchise contracts are the same as with other contracts. *Union Light, Heat & Power Co. v. Young*, 146 Ky. 430, 142 S. W. 692. So it is undoubtedly implied in this plaintiff's franchise that the gas it is given the privilege to furnish to the people and the city of Hastings shall be fit for the purposes intended, and a large volume of evidence on that question has been laid before the court. * * * On the whole question of fact, the evidence adduced before this court is that the natural gas is in every way and for every use and purpose discussed a better and cheaper fuel. * * * Such being the conclusions of fact drawn from the evidence, it follows that the plaintiff has a right under its franchise to furnish natural gas instead of artificial gas, and should be permitted to do so without interference from the city or its officers. * * * Injunction should issue enjoining such interference with the exercise

of plaintiff's rights as defendants now occasion, and jurisdiction in the case will be reserved."

A provision of the franchise expressly fixing rates is binding on the parties unless modified by mutual agreement or state authority, regardless of the adequacy of the rate, and this principle is clearly expressed in the case of *Georgia Power Co. v. Decatur*, 281 U. S. 505, 74 L. ed. 999, 50 Sup. Ct. 422, P. U. R. 1930C, 241, where the court said: "Prior to the commencement of this suit it had been finally adjudged in litigation between the city and petitioner's predecessors that the ordinance and contract bound the carrier not to charge more than five cents per passenger between points on that stretch of track in Decatur and the terminus of the line in Atlanta, and required it upon the payment of each full fare to give to the passenger a transfer ticket that would entitle him for one fare to ride between points on such track and points on any of the carrier's lines in Atlanta. It was also held that the state railroad commission was without authority to change rates that are established by contract. * * * March 3, 1903, the town of Decatur by ordinance granted the latter permission to discontinue operation and remove one of its Decatur lines upon the condition that it should continue to operate the stretch of track here involved and 'never charge more than 5 cents for one fare' for the transportation above described. And April 1, 1903, the town and the company made a contract by which each agreed to do all the things required to be by it performed under the terms of the ordinance. * * * But franchises for the construction and operation of street railway lines are granted by the state. * * * It is clear that this franchise and the rate contract of April 1, 1903, are still in force. There is nothing in the ordinance or contract to indicate a purpose to terminate the obligation of the carrier in respect of the five-cent fare while it continues to operate the line as part of its system under its present franchise (*Ft. Smith Light & Traction Co. v. Bourland*, 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249), and the contract will continue to bind petitioner during the period intended by the parties, unless earlier altered by them or relaxed by state authority. *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613. The losses attributable to the stretch of track in question and the five-cent fare are immaterial while the rate contract continues."

§ 131. Franchise rights follow growth of municipality.—The case of *People v. Deehan*, 153 N. Y. 528, 47 N. E. 787, indi-

cates that the contract right to own and operate a municipal public utility, which becomes vested on the acceptance of the franchise, is coextensive, not only with the limits of the city as defined at the time of the grant, but that the future growth and later additions to the city are covered by the franchise, for as the court said: "When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose, and duration. There is no good reason for restricting its operation to existing highways, unless that purpose appears from the language employed."

The effect of this principle is brought out in even a more striking manner in the case of *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245, where the court held that on the annexation of one independent municipality to the other, the existence of the former was terminated together with the privileges granted by it which are supplanted by the ordinances and franchises granted thereunder of the municipality which annexes the other. This principle secures uniformity in the service and encourages the extension of municipal public utilities on a uniform basis with the additions to the city by virtue of annexation; nor can the objection be raised that the franchise rights granted by the territory annexed are unjustly terminated, their duration not being fixed by the grant, on its becoming a part of the annexing municipality, because privileges granted are limited to the life of the municipality granting them. The decision of this point in the case just referred to is in part as follows: "The limitation that the defendant should not increase to its present or future subscribers within the city of Chicago the rates for telephone service then established had no provision restricting it to the existing limits of the city. The words of the ordinance are clear and not ambiguous, and apply to all the territory within the city of Chicago during the period of the grant. The ordinance having been accepted by the defendant became a contract by which both parties were bound, and the territory which has since been annexed to the city is within the city of Chicago. * * * The ground of defendant's claim that the ordinance does not limit its charges in the annexed territory is that before the annexation

the minor municipalities had granted to it the right to occupy the streets therein for its business without any limit as to time. If the grants had been for terms of years under legislative authority authorizing them, and the terms had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city because they had become binding contracts under which the defendant had vested contract rights for such terms. But they were not for definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service to the town or village hall or the village authorities free or for some reduced rate. Such grants can not be construed to be perpetual, and at most can not extend beyond the lives of the corporations granting them. Upon annexation, there ceased to be any town or village authorities entitled to the benefits of the contract or authorized to demand or receive them, and it could not have been understood that the grant should continue discharged of the obligation annexed to it. * * * The ordinances of the city extended over the annexed territory immediately upon annexation,⁹ and the limitations of the ordinance applied to the annexed territory. * * * To construe the ordinance otherwise would be to say that whenever any improvement is made in the service, the defendant may rid itself of all its obligations with respect to rates and still enjoy the grant—may retain the benefits and escape the burdens of the contract. * * * Under the ordinance, the defendant can not be required to adopt improvements in the service or equipment or to keep up with the general progress in the business, but if it sees fit to adopt improvements and furnish a better grade of telephone service, it can only have the benefit of the ordinance granting it the right to use the public streets by complying with the terms of the ordinance and not increasing the rates.”

The extension of this principle and its practical application is well illustrated in the case of *Union R. Co. v. New York*, 238 N. Y. 289, 144 N. E. 585, where the court said: “The right to maintain sidings and switches ‘reasonably necessary’ for the enjoyment of the franchise granted, during the entire life of the franchise, is clearly implied in the franchise whether the need for such sidings and switches is due to the original conditions or to changed conditions.”

⁹ *Illinois Central R. Co. v. Chicago, Illinois*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. 509.

The reason and practical effect of the principle that franchise rights follow the growth of the city is well expressed in the case of *San Francisco-Oakland Terminal Rys. v. Alameda County*, 66 Cal. App. 77, 225 Pac. 304, decided in 1924: "The act of 1889 (Statutes 1889, p. 358) provides that when the annexation is complete the annexed territory shall be 'to all intents and purposes a part of such municipal corporation.' This language is broad enough to support the conclusion that the supervision and control of all public highways within the annexed territory passes from the county to the municipality. As the percentage upon the gross receipts collected under the franchise is a fee for the supervision and control of the street railroads operating on public streets, it is reasonable to assume that the state intended that this percentage should be paid to its new agency."

In line with the principle that franchise rights follow the growth of the municipality and that increased facilities are required to serve a greater population and to take care of its normal growth, the court of Pennsylvania, favoring the increase in the sphere of municipal activity, approved the merger of similar companies in order that there might be sufficient capacity to serve the entire municipality and to encourage its growth, in the case of *Reeves v. Philadelphia Suburban Water Co.*, 287 Pa. 376, 135 Atl. 362, where the court reasoned as follows: "The supply of pure water to the public in territory thickly populated is today a most difficult problem, and its difficulties are bound to multiply as time goes on and population increases. Whatever may have been this court's position in regard to the water problem in previous decades, when its great importance may not have been fully realized, the tendency, as our decisions in their evolution will show, has been to broaden the view and to construe liberally grants of power to water companies, furnishing, as they do, the most essential of all public services to mankind, vital to life itself. * * * Under the law as it exists today, a company which has or can acquire water may unite with another company which has too small or no supply and fill the latter's mains, so that its customers may be served. Water companies exist to supply people with water, and legal valves ought not to be interposed to prevent the free onward movement of the supply."

That franchise contracts fixing rates follow the growth of the municipality is well established. But the right of the municipality to regulate rates for service beyond the limits of the city is limited by the power of the state acting through its corpora-

tion commission in the state of Virginia, as is indicated in the case of Lynchburg Traction & Light Co. v. Lynchburg, Virginia, 16 Fed. (2d) 763, P. U. R. 1927B, 466, where the court said: "This is an appeal from an order dismissing a bill in equity filed by the Lynchburg Traction & Light Company, hereinafter called the company, to enjoin the city of Lynchburg from enforcing an ordinance fixing a street car fare of five cents on certain lines of the company. The basis of the suit is that the ordinance complained of impairs the obligations of contracts evidenced by franchises granted by the city to the company. * * * These franchises, among other things, provided 'that no passenger shall be required to pay a fare exceeding five cents for transportation. * * *'. After 1908 the lines of the company were extended beyond the city limits, and in 1922 the corporation commission of Virginia authorized a fare of six cents between points outside of the city limits and other points on the lines. * * * On December 14, 1925, in anticipation of the extension, the council of the city adopted the ordinance complained of, which is as follows: 'Be it resolved, by the council of the city of Lynchburg, that the five-cent street car fare now charged by the Lynchburg Traction & Light Company, on its lines within the city of Lynchburg, shall be, and the same is, made effective after December 31, 1925, at 12 o'clock midnight, on all lines of said company in that territory to be annexed to and become a part of the city of Lynchburg on December 31, 1925, at 12 o'clock midnight.' It is this ordinance which is attacked; and the sole ground of attack is that it violates the contract clause of the constitution. There is no allegation that the rate fixed by the city is confiscatory, or that the company is in any manner denied due process of law or the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution. * * * We see no merit whatever in the company's first point. The bill does not allege that there was any contract by which the company was allowed to charge a six-cent fare to or from points beyond the city limits. On the contrary, it is expressly set forth that this rate was fixed by the state corporation commission. It was fixed, therefore, not by contract, or by modification of contract, but by exercise of the police power of the state. * * * As to the second point, that the ordinance increases the burden of the franchises or contracts by extending their provisions to the outside territory, the answer is that the ordinance makes no reference to the contracts or franchises, and it does not appear that the city, in enacting the ordinance, was

proceeding under or relying upon the franchises or contracts embodied in them. The franchises themselves do not attempt to bind the parties as to rates in the territory beyond the old city limits, and the mere fixing of rates for this outside territory, although possibly void on other grounds, could not be said to impair the obligations of a contract which had no reference to the matter. * * * It is well settled that a municipal ordinance not sanctioned by the law of the state is not a law impairing the obligations of contracts within the impairment clause of the constitution. * * * And it is the law of Virginia that municipalities have no power, either under the constitution or general statutes to prescribe rates (as distinguished from the power to contract therefor) to be charged by any public service corporation. *Town of Victoria v. Victoria Ice, Light & Power Co.*, 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562. It may well be that the ordinance is void, because not based on legislative authority, but, if void for that reason, it could not be said to be an act of the state impairing the obligation of a contract, for in such case it would not be an act of the state. The company contends, however, that it has alleged in its bill that the ordinance impairs the obligation of the contract, in that it extends its provisions over the territory to be annexed, and that it is entitled to stand upon this allegation. But the trouble is that the allegation is a mere statement of the conclusion of the pleader and is not supported by the facts alleged. * * * For the reasons stated, we think that the order dismissing the suit for lack of jurisdiction was properly entered, and same is accordingly affirmed."

§ 132. **Limitation.**—In denying the city the power to compel a street railway company to extend its service into new territory recently incorporated over which the company had no franchise to operate the court made an important limitation on this principle and a novel distinction between street railways and other public utilities, in the case of *Hollywood Chamber of Commerce v. Railroad Commission*, 192 Cal. 307, 219 Pac. 983, P. U. R. 1924B, 503, as follows: "To us it seems beyond question that the extent of the obligation of the Los Angeles Railway Corporation to serve the public although not necessarily limited by the street car lines now in operation, is limited and defined by the franchises under which it operates. The argument of the railroad commission seems to be predicated upon the erroneous assumption that a street railway company's public duty is analogous to the duties of a water, gas, electric power, or

telephone company, which are required to expand their facilities to meet the demands of a growing community. A street railroad company must obtain from the municipality a separate franchise covering each of its lines, whereas these other utilities are given franchises to supply the inhabitants of a particular community with water, gas, electricity, or telephone service. But where, as in the present case, the company does not hold franchises allowing it to voluntarily construct these extensions, there is no justification for saying that the company has impliedly undertaken to extend its lines whenever it should become necessary."

§ 133. Limitation as to fares.—An ordinance granting a franchise for the installation and operation of a public utility which provided for free service or a maximum rate is subject to modification at the hands of the state in the exercise of its police power, where the constitution provides that this power may not be abridged. Such is the effect of the holding in the case of *Springfield Consolidated Water Co. v. Philadelphia*, 285 Pa. 172, 131 Atl. 716, P. U. R. 1926C, 321, for as the court said: "The ordinance under which appellee entered the city provided for water free of charge. A contract that provides for free or maximum price service relates entirely to the commodity sold, whether it be water, light, passenger traffic, or other public service. The state, in the exercise of its police power, may regulate such contracts. It may modify their terms and substitute a reasonable rate of charge—one that is equitable and just to the utility and all consumers, *Scranton v. Public Service Commission*, 268 Pa. 192, 110 Atl. 775. This is the rule, although the contract for free or maximum rates be made under a provision of the constitution, where that provision comes in contact with the police power of the state exercised within specified limits for the public good. The police power in each particular community is supreme. * * * This state has held that no contract, private or municipal, can be made beyond the reach of regulation because of article 16 of the Constitution relating to nonabridgment of the police power."

A further limitation as to the contract rights of street railway systems to refuse to carry passengers beyond the limits of the city as fixed by its franchise is established in the case of *Georgia R. & Power Co. v. Decatur*, Georgia, 262 U. S. 432, 67 L. ed. 1065, 43 Sup. Ct. 613, P. U. R. 1923E, 387, where the court said: "It was competent for the municipality to enter into such a contract where the state had not exercised and was not seek-

ing to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action. * * * The contract rates apply only to the town of Decatur, as it existed when the contract was made. To apply them to additional territory is to impose a burden upon defendants outside the contract."

To the same effect the United States Supreme Court refused to find any right to free transfers or to service at the franchise rates to the additional territory incorporated in the city after the granting of the franchise, in the case of *Georgia R. & Power Co. v. College Park, Georgia*, 262 U. S. 441, 67 L. ed. 1074, 43 Sup. Ct. 617, P. U. R. 1924A, 527.

§ 134. Rights not expressly granted are reserved to municipality.—An excellent statement of the principle in question supplemented by the other which is equally well established that all rights that are not expressly granted are reserved and that the policy of strict construction against the grantee is adopted by our courts is furnished by the case of *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687 (affd. in 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. 400), decided in 1899, where the court held: "All franchises come from the state, although the legislature may, and often does, delegate to municipal authorities the right to take final action in the procedure resulting in the creation of a franchise."¹⁰ The effect of such action, if within the legislative permission, is to allow the grantee to carry on the business authorized by the franchise. All rights not expressly granted by it are, as we have seen, reserved. The rights thus reserved include in part the granting of a franchise to another corporation to carry on the same business in the same territory. The power to grant the additional franchise, as well as the first one, the municipality acquires from the legislature, which has the power to determine whether the rights reserved upon the grant of the first franchise shall be exercised by a private corporation or by the municipal corporation. It may well be that competition by the municipality more seriously affects the earning capacity of the private corporation than would the competition of another private corporation; but the test of legislative power in such case is not whether the agency selected to construct and operate competing waterworks is effective or otherwise, but whether the statute providing for the agency also contains provisions assisting it to impair or destroy

¹⁰ *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692.

the property of the private corporation by other means than competition."

In construing a franchise for the operation of street and interurban cars for the transportation of passengers, where freight in less than carload lots had also been carried, the court refused to find that the company had the right to transport freight in car lots by implication of the terms of the franchise, in the case of *Milwaukee v. Milwaukee Electric R. & Light Co.* (Wis.), 237 N. W. 64, where the court reasoned as follows: "There is no controversy between the city and the defendant, the present owner of the property and franchises of the Milwaukee Northern Railway Company, as to the right of the defendant to operate a street railway for the carrying of passengers, including 'interurban cars,' on the streets in question. The case presents the narrower question of whether that franchise includes the right to carry merchandise, freight, or package goods, and particularly the right to do so in cars used exclusively for such carriage. * * * They establish that, ever since the operation of the first interurban car under the franchise, the parties interested have considered the transportation of freight in less than carload lots, in compartments in interurban passenger cars, rightly a part of the authorized interurban service, even within the city limits. In that respect and to that extent, that practical construction by parties for some twenty-two years convincingly establishes that in using the terms 'interurban cars' in the franchise it was intended to permit the carriage of freight on interurban cars used primarily, but not exclusively, for passenger service. However, the evidence does not warrant any such conclusion as to the transportation of freight for hire in carload lots over city streets. It does not appear that the company ever attempted to do so until in 1915, when it proposed to transport a single car of milk daily. That service, if lawfully authorized, would have constituted an additional burden upon the abutting property, because of which the owners might have become entitled to compensation. *Wilbur Lumber Co. v. Milwaukee L., H. & T. Co.*, 134 Wis. 352, 114 N. W. 813. But the company, instead of engaging in that service, by virtue of authority lawfully conferred by franchise, contented itself with mere informal acquiescence obtained at a meeting of abutting property owners to the transportation of the single carload of milk daily."

§ 135. **Duty of municipality in granting franchises.**—The case of *Phoenix v. Gannon*, 195 N. Y. 471, 88 N. E. 1066, decided

in 1909, in sustaining this principle very wisely observes that the proper time to impose conditions and to provide for the proper regulation of corporations providing public utilities is in connection with the granting of the franchise. The court said: "The question whether a municipality can grant to an individual a franchise for the construction and operation of a street surface railroad is not free from doubt; but we are inclined to the view that the question must be answered in the affirmative. Primarily the power to grant franchises in the public streets resides in the state. Municipalities have only such power in this regard as has been delegated to them by the legislature."¹¹ That this sovereign power has been thus delegated is not questioned.

* * * If municipalities in granting such consents will hedge them about with proper conditions, individuals will not rashly or carelessly ask for franchises which they can not hope to use. In cities of the second class these franchises are now required to be sold to the highest bidder, and, if the element of competition in such municipalities is to be eliminated or limited by prohibiting individuals from bidding, that should be done by legislative enactment and not by judicial construction."

A requirement that street railway companies pave between their tracks will not be construed to include the duty of relocating their tracks where the municipality required that this be done, because as the court said, no fair implication of the duty to pave could include the obligation of relocating tracks by order of the public. This reasonable limitation of the principle requiring street railway companies to bear the expense of paving is established in the case of *District of Columbia v. Georgetown & Tennallytown R. Co.*, 41 Fed. (2d) 424, where the court defined this rule as follows: "In pursuance of this agreement the District of Columbia relocated the street railway tracks at a cost of \$59,756.55, and the present case was then brought by the District for the recovery of this sum from the street railway companies. The lower court found against the District upon the agreed statement of facts aforesaid, whereupon this appeal was taken. We affirm the judgment of the lower court. The enactment in question does not order the street railway companies to relocate their tracks, nor to pave between the rails after the tracks are relocated. * * * It is conceded that such a law existed with reference to the paving made necessary by the improvement. * * * The act, however, contains no provision

¹¹ *Beekman v. Third Ave. R. R.* *Fanning v. Osborne*, 102 N. Y. 441, Co., 153 N. Y. 144, 47 N. E. 277; 7 N. E. 307.

relating to the cost of the relocation of the companies' tracks, nor did any statute exist containing such a provision. The street railway companies contend that the act of June 11, 1878, aforesaid, contains the only provision of law then existing relating to such a refund, and consequently that they are liable only for the cost of paving thereby required. * * * In the present case there is peculiar reason for holding that this language refers to statute law only. The present controversy relates to the franchise rights and obligations of the street railway companies. Such relations are naturally defined by statute. It is conceded that congress by statutory enactment imposed upon the railway companies the duty of paving in and about their tracks, but no statute was ever enacted requiring them to pay for relocating their tracks in the street under circumstances like these. * * * It follows that the companies were not bound to refund the cost of relocating their tracks in this instance."

§ 136. **General and special franchises defined.**—The case of *New York v. Bryan*, 196 N. Y. 158, 89 N. E. 467, decided in 1909, furnishes an interesting illustration by analogy of the relative power of the state and the municipality in the matter of granting franchises to municipal public utilities by the following language: "But the consent of the municipal authorities was not the grant of an independent franchise, like the deed from the owner where the railroad runs through private property. Not only the franchise to be a corporation, but the franchise granted to a corporation when formed, spring from the state. It is the elementary definition of a franchise that it is a grant from the sovereign power. * * * The case is most analogous to that of a trustee who is authorized to convey the corpus of the trust only with the consent of the beneficiary. The consent of the beneficiary is necessary; nevertheless the title acquired by the grantee is that of the trustee, and not that of the beneficiary. Therefore the consent of the city was but a step in the grant of a single, indivisible franchise to construct and operate a street railroad."

§ 137. **Franchise rights protected by court of equity.**—The equity of this principle in protecting the property interests necessarily invested in the construction and operation of a municipal public utility plant under the special franchise privileges granted for the purpose is indicated in the case of *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777, decided in 1896, where the city was denied the right to revoke the special

privilege granted by it to a party for the purpose of constructing a system of sewerage, the court saying: "It was known to the parties that plaintiff must incur great expenses, and it would be absurd to hold that he and the city entered into this arrangement for their mutual benefit with the understanding that the city might at any time revoke it, and impose the entire loss upon the plaintiff. * * * The passage of the ordinance and its enforcement did not, therefore, give the plaintiff a remedy by an action at law to recover damages.¹² We think the only appropriate remedy is by some proceeding to restrain the action of the council from interfering with the plaintiff's legal rights."

While the courts of equity will protect valid franchise rights, no relief is available to a public utility seeking to prevent competition in its service in connection with the provision of a franchise, giving the city an option to purchase such competing plant, especially before any attempt has been made to exercise the option or acquire the plant, for as the court said in the case of *Iowa Public Service Co. v. Emmetsburg*, 210 Iowa 300, 227 N. W. 514, P. U. R. 1930D, 29: "The plan does not contemplate the levy, collection, or use of a dollar of taxes in the acquisition of the plant. In brief, the plant, when acquired, if it is ever acquired, will have cost the municipality absolutely nothing. The right of the city council to fix the rate is wholly unimpaired. Therefore, there is nothing for the taxpayers to complain of, although, as stated, the plaintiff, as a taxpayer brings this action, and upon this basis only. * * * If it is urged at this point that this situation would be unfair to private consumers who must patronize one or the other of the present concerns, both of which we understand are now in full operation, the answer is that no private consumer is at this time making any complaint. * * * This privilege is an option only and shall not bind said city of Emmetsburg, or make it obligatory to take over said plant. It is obvious, therefore, that the city of Emmetsburg is not obligated to take over this plant, and it must be borne in mind that the city council can not be required to do anything except that which is authorized by law. * * * It is apparent that the motive of the plaintiff is not to protect the city or its citizens against extortion, but to exterminate, if possible, a competitor. In no way can we view this case, wherein the plaintiff can suffer the slightest inconvenience or damage, except

¹² *Trammell v. Russellville*, 34 Streator, 130 Ill. 238, 22 N. E. 810, Ark. 105, 36 Am. Rep. 1; *Culver v.* 6 L. R. A. 270.

in the matter of competition, and this does not constitute an equitable ground for restraint."

Where a company has been furnishing gas with the consent of the authorities but without an actual franchise or permit from the town, which was incorporated after the company had been furnishing it service for a number of years, the court of equity very properly recognized the good faith of the company and respected its investment as well as the desire of the inhabitants for the service, and held that it would be inequitable for the town to interfere with a continued rendering of the service, but provided that no extension could be made for additional service without the consent of the town being first had, in the case of *Marmet Gas Co. v. Marmet*, 102 W. Va. 605, 135 S. E. 839, for as the court said: "The Marmet Gas Company has been engaged in furnishing gas to a part of the town of Marmet since 1919. The town was not incorporated until 1921. The company has never had a franchise or permit from the town authorities, but prior to incorporation had a permit from the county court to use the highway through the town. In November of 1925 the company was served with a notice from the town council 'to refrain from digging up any of the streets or alleys in said town of Marmet, or placing gas pipes or other obstructions whatsoever within the limits of said streets and alleys, until authorized so to do in the manner provided by law.' * * * A decision in accordance with these modified demands will be an equitable adjustment of this cause. Plaintiff has been allowed to proceed with its plan to supply gas to the town, and to make considerable outlay of money. As long as its system is maintained, the comfort, health, and even safety of its customers require that it be permitted to occupy the streets to the extent necessary for ordinary repairs. A proper use of the streets by it will interfere very little, if any, with the public use. The defendant has known of the development of plaintiff's system and has seemingly acquiesced therein. It would be inequitable now for the municipality to hamper seriously the plaintiff's business. * * * On the other hand, the plaintiff has no right to use the streets of the town for extending its system, or to interfere seriously with the use of the streets by the public, in repairing its present system, without the permission of defendant."

Where an ordinance granting a franchise for a fixed period of years to operate a public utility within the streets of a municipality was approved by the voters and accepted and acted upon by the grantee, who attempted in good faith to comply with its

terms for a number of years, a court of equity held that he should not be disturbed in these franchise rights because of any technical defect in their grant, in the case of *Mapleton v. Iowa Light, Heat & Power Co.*, 206 Iowa 9, 216 N. W. 683, for as the court said: "The very terms of the contract proposed was on the ballot offered the voter. He knew that, if Leitzen was given a vote sufficient to grant the franchise, he would have the right to construct and operate a plant for twenty-five years without any special privilege being granted to him other than to sell electric current and to use the streets, alleys, etc., for his poles and wires. * * * The council simply functioned and put its seal of approval upon the vote of the people. Leitzen formally accepted this ordinance and thereby completed the grant or franchise. * * * Leitzen attempted, in good faith, to comply with the law relative to the granting of a franchise. He and his assignees operated for ten years without interference. Every one connected with the initial proceedings acted in good faith. This may not be a material consideration in the determination of this case, but it affords persuasive reason why the appellant, in a cause tried in equity, should not be disturbed. We hold that the defendant was the owner of a valid franchise, and the decree entered by the trial court is reversed."

Where funds were deposited with the municipality as security for the performance of its franchise, a street railway system, on the surrender of its franchise, is entitled to a return of these funds, although there was no express provision in the franchise to that effect. In holding that there was an implied obligation on the part of the municipality to return the funds deposited with it when they had served their purpose, the court in the case of *Puget Sound Power & Light Co. v. Seattle*, 142 Wash. 580, 253 Pac. 1083, said: "If the city acquired title to these trust funds, it must have been by virtue of these provisions, but, when they are read carefully and as a whole, it fully and clearly appears that respondent was surrendering its franchises, thereby divesting itself of any further right to operate street railways. The city was acquiring no right under the franchises, because it needed no such franchise right and no such fund to enable it to operate street railways. The funds in question were not property used in the operation of the street railway, but merely security for the performance of its franchise duties. Money and choses in action were specifically excepted, and the trust fund must either have been respondent's money, or, when by the delivery of the deed the purpose for

which it was deposited ceased, it then became a chose in action, to which the city had no defense, save only a possible prior default under the terms of the franchises, which is not even suggested. * * * The franchises were written instruments within the meaning of these statutes. They were required to be, and were, accepted by the grantees in writing. Under these written agreements the deposits were made and the money was held by the city. True, there is no express provision in the franchises to the effect that the city shall return the money when the franchise is surrendered or otherwise terminated, but there is an implied obligation to so return the deposit when its purpose is served, and no further liability for which it could respond can occur."

While as a general rule a special franchise is necessary, where equipment is placed in the streets with the consent of the municipality, the public utility will be protected by a court of equity against the use of its equipment without its consent and payment for the privilege of using it, as is indicated in the case of *Witty v. Corpus Christi Plumbing Co.* (Tex. Civ. App.), 25 S. W. (2d) 169, where the court said: "The evidence shows that appellant owned the two-inch water pipe, which was perhaps 700 feet long, and that runs along the front of twelve lots owned and controlled by him; the pipe being laid between his property line and the sidewalk, or at least the land that will be used for sidewalks whenever constructed. The pipe was laid with the knowledge and consent of authorities of the city of Corpus Christi. The main pipe was tapped by persons not living on appellant's property nor on that contracted for sale by him. When appellant disconnected the lateral pipe, it was, over his protest, again connected with his pipe, and this suit was the result. The pipe cost appellant about \$600. The evidence indicates that the city was satisfied with the pipe being laid where it was and has no objections to it. It did not assume to give permission to appellees to connect, the officer merely stating that they could connect so far as he was concerned. The pipe was the property exclusively of appellant and he alone could authorize the use of the pipe. He gave no such permission, except on condition that the appellees would pay him \$50. They refused to pay anything, and for the second time connected their pipe with appellant's pipe. * * * The city had the authority to permit the pipe to be laid by appellant, and no one else has the right to the use of the franchise granted by the city. The fact that such franchise may not have been granted by ordinance

could not be made the pretext of trespassers to use the property of appellant. They were invading his rights when they sought to use his property, and a court of equity should grant relief from the clear invasion of his rights."

§ 138. All franchise rights subject to exercise of police power.—That the contract right and property interests are subject at all times to the regulation of the police power and that the special franchise privilege may be revoked or materially modified before the expenditure necessary to install and operate the public utility plant or a part of it has been incurred is the effect of the decision in the case of *Lake Roland Electric R. Co. v. Baltimore*, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126 (affd. in *Baltimore, Maryland v. Baltimore Trust Co.*, 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. 696), decided in 1893. In this case, however, the city had the right to repeal the ordinance and to modify its consent to the laying of a double track in a certain street as a part of the street railway system. By limiting that right to a single track in the interest of the public safety and after due notice given to the corporation that it would so modify its consent, the court held that the municipality was not liable for expenses incurred in building the double track after the giving of such notice, for the reason that the ordinance giving such consent did not vest in the company an irrevocable right in the streets. In the course of its opinion the court said: "Although the city had a right to repeal this ordinance, it would have been obliged to make compensation to the railroad company if the expense of laying the tracks on Lexington street had been reasonably incurred in reliance on Ordinance No. 23. The cases which we have already cited show the opinion of this court on this subject. But the tracks were laid on Lexington street after the mayor's objection to a double track was made known to the president of the railroad company. * * * On the 7th of November the mayor and city solicitor each wrote a letter to the president, informing him that at the first meeting of the city council an ordinance would be submitted to prohibit the laying of the double track. After the receipt of these letters by the president the work of laying the double track was continued night and day, without intermission, until it was completed. * * * We do not see how, in any way, the city can be held responsible for the expense incurred under these circumstances by the construction of these Lexington street tracks. To say the least, the expense was unnecessarily incurred, after full knowledge of the purpose on the part of the mayor to recom-

mend the passage of the repealing ordinance so soon as it could be effected. The ordinance was promptly passed as soon as the city council met."

§ 139. Franchise grants for benefit of inhabitants primarily.—That the interest of the city in granting such special privileges is for the general welfare and the common good of its citizens and not for the private advantage of the city as distinguished from its inhabitants and that the action in granting the consent of the city is a public governmental one and does not involve the private proprietary interests of the city itself are well indicated by the case of *Louisville Home Tel. Co. v. Louisville*, 130 Ky. 611, 113 S. W. 855, decided in 1908, where the court spoke as follows: "A municipality has the power and right to erect, maintain, and operate plants, and use the public streets for furnishing such utilities for the municipality itself and to its inhabitants. Such power or duty it may discharge by having others perform them for it upon such terms as may be agreed upon in the form and manner prescribed by law. What, therefore, is commonly termed the 'granting' of a franchise by a city for one of these public utilities is in the nature of a contract by the city with the grantee for the performance of a public service. * * * From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or procuring the service of such utilities, is not the revenue to be obtained for the city, but the securing of good and efficient service, and upon such terms as will, in the judgment of the city's governing body, promote the greatest good, not alone to those who use the utility, the telephone for instance, but to the entire community, including city government."

§ 140. Granting franchise is public and governmental duty.—As the city is acting in its governmental capacity and not for the benefit of its private business interests, there is no liability in damages on the part of the city where its officers attempt to revoke the franchise privileges by passing a repealing ordinance. Although the officials in passing such an ordinance attempted to revoke the special privilege in the exercise of its police power, if they did not have the necessary power to do so, the repealing ordinance would be ineffective and its passage might be enjoined, but the municipality could not be subjected to a liability in damages for such action, because as the court in the case of *Edson v. Olathe*, 81 Kans. 328, 105 Pac. 521, 36 L. R. A. (N. S.) 861, decided in 1909, said: "Therefore the city is under no more lia-

bility for the conduct of its officers in publishing an ordinance, whereby it acquires the quality of law, than it is for the conduct of the same officers in considering the ordinance section by section, or in voting upon it. In granting the franchise the city acted in a purely governmental capacity. It sought to promote the general welfare, and nothing else. It had no private, proprietary end in view, obtained no advantages of that character, and assumed no obligations of that kind. The repealing ordinance dealt with the same subject, the general welfare, and nothing else. * * * What the city officials did was to prevent the streets from being invaded and permanently occupied by the plaintiff with its ties and rails and wires and poles and moving cars, to the detriment of the traveling public. It may be that the repealing ordinance was void. * * * If the city officials acted in bad faith, the city might be enjoined¹³ but it is quite elementary that such officials could not, by departing from official probity and duty in the field of governmental activity, convert themselves into private corporate agents, with capacity to bind the corporation in pecuniary damages."

§ 141. **Municipal conditions must be reasonable and not arbitrary.**—The case of *New Hope Tel. Co. v. Concordia*, 81 Kans. 514, 106 Pac. 35, decided in 1910, indicates the limitation which the court places on the power vested in the city of imposing conditions by way of regulation in granting its consent to a municipal public utility to the effect that the condition must be reasonable and that the consent can not be withheld arbitrarily because such action would nullify the rights granted by the state. As the court expressed it: "No company should undertake to enter a city and erect poles and string wires over or along streets, alleys, or public grounds without making application and a proper effort to procure the passage of an ordinance defining the manner and place of construction of the contemplated lines. Such an application the council may not deny. It may regulate, but not exclude. The telephone companies get the right directly from the state, and not from the city. The city may prescribe terms and conditions upon which the right granted by the state shall be exercised, but it has no power to annul the right granted by the higher authority."

While recognizing that a municipality may impose its own terms and conditions on a street railway company in granting a franchise for the use of the streets, such conditions must not be

¹³ *Paola v. Wentz*, 79 Kans. 148, 98 Pac. 775, 131 Am. St. 290.

unreasonable or arbitrary. Where the tracks of the company are located on its own property or on property which it had acquired the right to occupy, the municipality had no power or right to insist upon the railway company's paving between its tracks, in the absence of any agreement to that effect. But where the municipality, in granting the franchise to the railway company, provided that the company should build a viaduct as a condition of granting the franchise, and it appeared that the viaduct was located within the city, the court held that there was an implied contract of the company to maintain the bridge, which the company had expressly agreed to construct, for as the court said in the case of Lynchburg Traction & Light Co. v. Lynchburg, 142 Va. 255, 128 S. E. 606: "Usually cities and towns have the right to exclude street railway companies from their streets, and they do exclude them unless they will agree to such terms and conditions as the city or town may impose. A common condition is that the railway company will pave and keep in order the space between their rails and a certain distance outside of the rails. This is the price paid for the privilege, but it can not be demanded where no privilege is granted. In the instant case, the street railway was built wholly on land owned by the company, or which it had the right to occupy with its tracks. It asked no rights or privileges of the city. The city simply reached out and took it in. It had no power to oust it from the street, or to demand that it should pave between or beside its tracks. It had granted no privilege to the railway company, and could impose no condition. * * * The street railway company was doing a lawful act in a lawful way, and this could not give rise to a cause of action in favor of the city. To say that it was as necessary to pave between the rails as outside of them, and that, as the railway company placed the rails in the street, it should therefore pay for paving between them, is simply begging the question. The primary duty of keeping the streets in order is on the city, and it can not unload this duty on the railway company unless it shows that, by contract or some legal duty, the street railway company was obliged to do the paving. * * * The item of \$3,150.75 for repairs to the viaduct stands on a different footing. The viaduct was wholly within the city limits in 1890, and, on the application of the land company, long before its conveyance to the street railway, it was permitted to enter the city with its works, to build a bridge or viaduct, to occupy certain streets of the city, and to build a double-track street railway along that portion of River-

mont avenue within the city limits, including the bridge or viaduct. The land company asked the city to accept that part of Rivermont avenue, including the bridge, 'as one of the streets of the city,' and the council by appropriate ordinance did accept it, 'as one of the streets of the city, and named "Rivermont avenue."' This was the grant of a franchise by the city.

* * * The bridge was to be constructed, and in fact was afterwards constructed, for use of all kinds of vehicles, and, while the street cars had the right of way along the tracks, that part of the bridge was intended for use by other vehicles as well as by the street cars. The dedication imposed no duty upon the city to maintain the street car lines, nor upon the company to maintain other portions of the bridge. Under the circumstances, we are of opinion that there was an implied covenant on the part of the company to maintain the part of the bridge occupied by the street car tracks in conformity with the condition in which the city kept the residue of the bridge, so that the public might, with safety and convenience use the entire surface of the bridge which had been set apart and dedicated as a public street. We rest our conclusion on this branch of the case upon this implied covenant, by which a quid pro quo was furnished for the franchise granted, independent of the authorities hereinafter referred to, which are not entirely in harmony with each other."

While the courts recognize a wide discretion in municipal officials in the granting of franchises, they hold that their conduct must not be arbitrary or corrupt, as is indicated in the case of *Groover v. Irvine* (Ky.), 300 S. W. 904, where the court said: "In granting franchises for the public benefit, a city council acts in a legislative capacity. In the exercise of this power a discretion is vested, which can not be taken away by the courts. Inasmuch, however, as the members of the city council act as trustees for the public to the end that the latter may obtain such conveniences as telephones, electric lights, and the like, they may not, after the sale of a franchise, arbitrarily or corruptly reject all bids and thereby escape the obligation to award the franchise to the highest and best bidder. However, when the exercise of the power and discretion to reject bids is attacked in the courts, the presumption will be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public."

In stringing its wires along the streets, the public utility is given the right to trim trees sufficiently for their clearance even

in the absence of express authority, because such action is necessary for the enjoyment of the franchise privileges, and the company is only liable for unnecessary damages inflicted and where more trimming is done than is necessary. This is established in the case of *Moss v. Peoples California Hydro-Electric Corp.*, 184 Ore. 227, 293 Pac. 606, where the court expressed the rule as follows: "The plaintiff contends that this trimming was unnecessarily extensive, that it exceeded the authority which she had conferred, and that it damaged the value of her real property. * * * Before beginning this work the defendant obtained a franchise from the city council of Lakeview which authorized it to string these wires in the street upon which the plaintiff's property faced and to erect the necessary poles at places to be selected by the city's engineer. The work was done in compliance with the franchise and the instructions of the latter official. As above stated, the parties are agreed that the plaintiff granted to the defendant the right to trim the trees sufficiently to afford a four-foot clearance for its wires, and that such a clearance was ample; but, even if no express authority had been obtained, the authorities hold that an electrical company which has strung wires pursuant to a legal franchise may trim overhanging branches which interfere with its wires if such removal is reasonably necessary to assure safety and the enjoyment of the privileges conferred by the franchise. *Elliott on Roads & Streets* (2d ed.), section 806 and 20 C. J. p. 310, section 11. * * * It ought to be readily possible for the plaintiff to develop sufficient facts which will disclose the real value of her property both before and after the alleged wrongful act without resorting to personal value. If the property possesses a market value, that fact should be shown, and her damages should be measured by the difference between the market value of her property before and after the alleged wrongful act."

Where the granting of a franchise is provided for by statute, requiring the passing of an ordinance and the approval of the voters, it is held to be the duty of the municipal authorities to hold a special election for the purpose when a proper petition is presented requesting that this be done, although the municipality is not obliged to grant the franchise by ordinance even after a favorable vote of its citizens, for as the court said in the case of *Iowa Public Service Co. v. Tourgee*, 208 Iowa 36, 222 N. W. 882: "Obviously, it is the intent and purpose of the legislation aforesaid that an electric franchise ordinance shall be under the complete control and discretion of the city council, except that

it is necessary for the voters to approve or authorize the same. Enactment is not made by the voters. They simply approve or authorize, and the council enacts. It is contemplated by Code, section 6131, supra, that the city shall not grant a franchise until voted on favorably by the people, not that it is granted if the vote of the people favors it. A double safeguard is thereby provided. * * * Consequently, the council of Sac City were not required to pass the franchise ordinance, even though the legal voters authorized it. Illegality does not exist because the petition contained a proposed franchise ordinance. Therefore there was before the mayor a legal and valid petition requiring him to call a special election. He should have done so, and, under the circumstances, mandamus will compel him to thus act."

While the court will respect the discretion of municipal authorities in the matter of granting franchises, it will refuse to permit arbitrary or unfair action, especially where the action taken was for the benefit of the municipal authorities personally and against the best interest of the public generally and the existing public utility, for as the court said in the case of *Norris v. Kentucky State Tel. Co.*, 235 Ky. 234, 30 S. W. (2d) 960: "Though in construing this section of the constitution we have held that in granting franchises for the public benefit a city council acts in a legislative capacity, and its discretion can not be taken away by the courts, we have also held that, inasmuch as the members of the city council act as trustees for the public to the end that the latter may obtain such conveniences as telephones, electric lights, and the like, they may not, after the sale of a franchise, arbitrarily or corruptly reject all bids and thereby escape the obligation to award the franchise to the highest and best bidder. * * * The city council then and there arbitrarily refused to grant said petition or to repeal or modify said ordinance, or to offer any franchise for sale. The appellee company now has property consisting of equipment, poles, lines, exchanges within the corporate limits of the city of Augusta of the value of \$25,000, and 135 patrons are using its 'phones. * * * On the contrary, the case is one where the owner of the expiring franchise endeavored in every way to get the council to act and offer a new franchise for sale. It refused for a period of three years to take any action. It then offered a franchise for sale. It then delayed action on the bid for a period of six months. When it did act the mayor of the city and some of the members of the council were interested in a rival telephone company, which opposed the acceptance of the bid, and by reason of their

active opposition the bid was rejected. * * * In view of all these circumstances, we are constrained to the view that the action of the city council in rejecting the bid was arbitrary, and that the court did not err in directing its acceptance."

Under the well-established rule that municipal regulations must be reasonable and that conditions must not be imposed that are arbitrary, the court refused to sustain the action of the municipality by ordinance prohibiting the operation of "one-man" cars because the court found that the economy of such operation justified its use and that the adoption of the regulation against it was unreasonable and unnecessary in the interest of the public safety. In the course of its decision, the court also indicated that there was some question as to the validity of the action in adopting the ordinance, in the case of *Dayton, Ohio v. City R. Co.*, 16 Fed. (2d) 401, where the court said: "This is an appeal from a final decree enjoining the enforcement of a Dayton city ordinance, which, in effect, prohibited the use by the street railways of the so-called 'one-man' cars. * * * The rights of plaintiff to continue to operate under the 1921 ordinance, if still valid, and to use its assets in the earning of a return unburdened by the expense created by the new ordinance, are prima facie property rights, such that, if they are taken away without due process, the Fourteenth Amendment is violated. *Great Northern v. Minnesota*, 238 U. S. 340, 345, 35 Sup. Ct. 753, 59 L. ed. 1337. So, also, the ordinance of 1921 and its acceptance by the company, involving the expenditure of large amounts of money in meeting the conditions of the ordinance and readjusting its operations upon a new basis indicate prima facie the existence of a contract under the Ohio rule above stated, however it might be in many other states. *Cleveland v. Cleveland Ry.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102. However, the city plainly has the right to pass an ordinance which would otherwise be a violation of a contract, or a taking of property without due process, provided that such ordinance is the valid exercise of those police powers which are expressly or impliedly reserved in the passage of any ordinance of a contract color, or which always by their underlying existence justify some interference with the otherwise free use of property. *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169; *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. ed. 348, Ann. Cas. 1917B, 927; *N. W. R. Co. v. Commission*, 265 U. S. 74, 44 Sup. Ct. 439, 68 L. ed. 904. Thus the sole question, upon this branch of the case, is whether the ordinance of 1923

was a valid exercise of police power; and since no claim is made that any police power is involved, save that concerning the public safety, the specific inquiry is whether the ordinance of 1923 may be considered as reasonably adapted to promote the safety of the public in Dayton. Upon this subject the opinion of the Supreme Court in *Sullivan v. Shreveport*, 251 U. S. 169, 40 Sup. Ct. 102, 64 L. ed. 205, teaches that it depends upon the facts of each case whether the adoption of such an ordinance can be said to be, upon the one hand, arbitrary, or, on the other, to be within the limits of the legislative power on the subject. * * *

It must be noted that the question as to the safety of these one-man cars is not an absolute one. To show merely that there had been accidents and injuries in their use is only to cover part of the question. There is necessarily involved a comparison between the two-men type and the one-man type, because accidents with either are practically inevitable. The criterion must be whether there was reasonable ground to conclude that the cars forbidden by the new ordinance were substantially more dangerous to the public than the old cars, a return to which was directed. We thus find that the bill presents a claim of right under the Fourteenth Amendment, and a claim of right under section 10, article 1, not only in good faith, but upon such foundations of fact, and of argument that they are entitled at least to serious consideration and study. Upon the question of jurisdiction of the federal court nothing more is necessary. * * *

It is the familiar rule that, when the jurisdiction of the federal trial court is thus properly invoked upon a federal ground, the court may consider all the contentions involved, and may decide the case upon a nonfederal question, leaving the others undecided; and, in view of the gravity of constitutional questions, the courts are in such cases inclined to take this latter course. *Siler v. Louisville &c. R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. 451, *supra*, at pages 191, 193 (29 Sup. Ct. 451). This case presents, not only the questions which have been specified, but also the claim that the ordinance of 1923 was not passed in the manner required by the Dayton city charter, and hence is invalid for that reason. * * *

A municipal ordinance in violation of the Constitution of the United States is nothing, because it is no law; such an ordinance in violation of the state constitution or state statutes can not be less than nothing; hence the mere fact that a state-wide law may be successfully attacked under the state constitution, or that a municipal law may be invalid under general state laws, can not de-

feat the federal jurisdiction now invoked. Chief Justice White said in *Home Telephone Co. v. Los Angeles*, 227 U. S. 278, 285, 33 Sup. Ct. 312, 314, 57 L. ed. 510, that this contention, if sustained, 'would in substance cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment.' The true principle of these cited cases, as will be seen by detailed examination, is that, when a municipality has no purported power or color of power to pass an ordinance, one which it does pass does not attain to the dignity of a 'law of the state'; but it seems clear that when the power exists, but is only imperfectly executed, so that the ordinance has color of validity, it is for this purpose a 'law of the state.' The ordinance now in question purports to be fully authorized by the provisions of the city charter. The constitution of the state, in its so-called home-rule provisions, in connection with the adoption of the city charter thereunder, undoubtedly operates as a complete delegation to the city of the entire normal legislative power of the state upon this subject-matter. We have no doubt that this ordinance, even if defectively adopted, is a law of the state, within the contemplation of the Fourteenth Amendment, and is action by the state, within the meaning of section 10. * * * Lacking any contrary construction by the state courts, we must hold that these petitions, because they do not contain twenty-five per cent of the registered voters, were not signed by the minimum number required by the charter."

§ 142. State interest and regulation control municipality.— This same principle is decided with a different application, indicating that it is a practical necessity as well as a sound principle of law, in the case of *Wichita, Kansas v. Old Colony Trust Co.*, 132 Fed. 641, decided in 1904, where the court held that the city could not withhold its consent or impose unreasonable or prohibitory conditions on granting its consent to a telephone company whose operations were national in their scope. This feature of the case illustrates the necessity of limiting a municipality so that local interest will not unduly interfere with state or national agencies. Nor is this principle limited in its application to the telephone for the telegraph and certain electric lines as well as other municipal public utilities are not limited to any particular locality so that the policy controlling their operation can not be merely local in its nature. The general welfare of all concerned must be the test of the control exercised and limits the power of any locality to regulate the particular public utility.

As the court expressed it in the case just cited: "Local telephone exchanges are coming to be, in relation to the general telephone business, quite similar to local telegraph offices with respect to the general telegraph system. The long-distance telephone is becoming national in its scope. We feel justified in holding that the legislature of Kansas did not intend to vest in any municipality power to destroy a general system of telephone exchanges, extending not only over the entire state, but over several states. The state as a whole is interested in the subject, as well as the city. Furthermore, the extraordinary power which the mayor and council of the city of Wichita are seeking to exercise is such as can only be sustained when resting upon unquestioned right. The local telephone exchange of the Kansas & Missouri Telephone Company has existed in that city for nearly twenty years. It has been built up gradually. It represents an investment of many thousands of dollars. The municipal authorities claim the power to destroy this large property. Their contemplated action can have no other result. A telephone exchange is not movable property. To remove it is to destroy it. The city makes no complaint that the telephone corporation has not promptly and faithfully complied with all municipal regulations. It claims the right not to regulate, but to expel. It is our conclusion that it does not possess that power."

A succinct statement of this principle of limitation placed upon the municipality is furnished in the case of *Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396, decided in 1879, in the expression "that a municipality can not abridge its legislative power by contract, and that it can not impair a contract by its legislative power, that a municipality can not make a valid contract beyond its power to contract, and that a contract made within its power to contract is valid."

Because of the jurisdiction of metropolitan water districts and of the universal need of their service, the court recognized the necessity of their state regulation, in the case of *Pasadena v. Chamberlain*, 204 Cal. 653, 269 Pac. 630, as follows: "The act in its body provides for the organization of so-called metropolitan water districts for the purpose of developing, storing and distributing water for domestic purposes, and which districts are to be formed of the territory included within the corporate boundary of any two or more municipalities, which need not be contiguous, and which districts are to be incorporated and organized and thereafter governed, maintained, and operated as in said

act provided. * * * If, therefore, we are correct in the conclusion that the Metropolitan Water District Act is a general law, and if we are also correct in holding in accord with the foregoing authority, that the general purpose proposed to be accomplished by said act takes it beyond the narrow scope of dealing with a merely municipal affair, it follows irresistibly that the legislature under the express provisions of section 6 of article 11 of the state Constitution had full power by the passage of said act to impose duties and impress powers upon municipalities other than those provided for in their charters for the purpose of accomplishing the objects contemplated by such legislative act. * * * The supplying of water for domestic uses within municipalities has grown of recent years to be one of the most common and well-recognized forms of municipal activities wherein public property is employed and wherein public taxation is imposed and collected upon the inhabitants of the municipalities regardless of benefits conferred upon particular property, and by the same method by which taxes are generally levied and collected for the carrying on of the governmental functions of incorporated cities and towns."

§ 143. **Municipal regulation once provided is final and binding.**—By way of defining and illustrating the power reserved in the city under the police power the case of *Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, decided in 1895, correctly expressed the rule of law to the effect that when the municipality gives its consent to the installing and operation of a municipal public utility plant and provides as a condition of such consent that a bond be given to the effect that the condition of the streets will be maintained as found in connection with the laying of pipes, the municipality can not thereafter require the securing of a further permit from the city and the furnishing of another bond by way of additional security that the streets will be maintained in the original condition, for the reason that the conditions first exacted cover the case and provide all the necessary precaution intended to be secured by the later ordinance requiring the additional consent and security. In the course of its decision the court observed: "Is the ordinance of 1890 a valid exercise of the police power, which the city did not surrender in granting to appellee the franchise in question? There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas com-

panies.¹⁴ It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions.¹⁵ When these terms and conditions proposed by appellant were accepted by the appellee, and complied with, it became a binding contract.¹⁶ But the appellant contends that such grants are but the exercise of police power, and may be changed or repealed by the granting power. * * * We are constrained to hold that the ordinance of 1890 is inoperative and void, so far as it may be invoked to abridge or restrict appellee in the exercise of the rights and privileges acquired by it under the ordinance of 1887. In consonance with reason, it can not be held that the appellee, which had already obtained the consent of the city by virtue of the ordinance last mentioned, must be required to secure a new consent."

Where the rate is fixed by a franchise and becomes a material provision of the contract, the same will be upheld where the municipality had the authority so to fix rates, as is clearly indicated in the case of *Kentucky Utilities Co. v. Paris*, 237 Ky. 488, 35 S. W. (2d) 873, P. U. R. 1931C, 124, for as the court said: "The question is whether the rate increases made in the manner and under the conditions stated in Lexington, Mt. Sterling, and Winchester justified the appellant in making a similar increase in Paris. The franchise constitutes a contract, and its obligations are binding upon both parties. * * * The construction of the contract is a simple and easy task, for its terms are plain and unambiguous. It first limited the rate to be charged in any event at not exceeding fifty-five cents, with an allowance of five cents for prompt payment; and it then plainly provided that the thirty-five-cent net rate should continue in effect for the same length of time it prevailed in Lexington, Winchester, and Mt. Sterling, or any of them, and when an increase in rates was made in those cities a similar increase should become effective and operative in Paris. * * * It is plain that the gas company was within the rights conferred by its franchise in conforming its charges in Paris to the conditions prevailing in Lexington, Winchester, and Mt. Sterling. It is equally clear that it was entitled to charge the fifty-cent rate after December 1, 1927."

¹⁴ *Citizens Gas &c. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624.

¹⁵ *Elliott, Roads & Streets* (4th ed.), § 1045, p. 1424; *Dillon, Mun. Corp.* (5th ed.), § 706; 2 *Woods, Ry. Law*, p. 986.

¹⁶ *Western Paving &c. Co. v. Citizens St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. 462.

§ 144. **Municipal consent when accepted creates binding contract.**¹⁷—That the city may not in the exercise of its police power giving it the right to regulate a business in effect prohibit the carrying on of a business which has been duly authorized, although the consent of the city when first granted was a mere license, because in pursuance of such consent the corporation providing the public utility had made substantial investments which would be lost to them if the right was revoked, is the effect of the decision in the case of *Chicago v. Chicago & O. P. Elevated R. Co.*, 250 Ill. 486, 95 N. E. 456, decided in 1911, where the court said: "The privilege of the use of the public streets of the city or town, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for, if the grant is for an adequate consideration and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust."¹⁸ * * * The right of the city, by the exercise of its police power, to regulate any business or the use of any property does not give the power to prohibit the conducting of a lawful business or to suppress entirely the use of property.¹⁹ It is contended by appellant that it has the power to declare such a situation as is here presented to be a nuisance and to suppress the same. Appellee is conducting its business in accordance with the grant made originally by the town of Cicero. It constructed its road by authority of law, and is operating it, under the terms of the grant, for the accommodation of the public. The city can not, by a mere declaration, show the operation of the appellee's road through the territory in question to be a nuisance, and subject its tracks to removal. The public welfare demands that there

¹⁷ This section (§ 114 of 2d edition) cited in *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363.

This section (§ 114 of 2d edition) cited in *Chrysler Light & Co. v. Belfield*, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

This section of third edition cited in *Northern Texas Utilities Co. v. Community Nat. Gas Co.* (Tex. Civ. App.), 297 S. W. 904, *affd.* in *Community Nat. Gas Co. v. Northern*

Texas Utilities Co. (Tex. Civ. App.), 13 S. W. (2d) 184.

¹⁸ *Chicago Municipal Gas Light & Co. v. Lake*, 130 Ill. 42, 22 N. E. 616; *Belleville v. Citizens Horse R. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *People v. Blocki*, 203 Ill. 363, 67 N. E. 809.

¹⁹ *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892.

should not be a discontinuance of the operation of an authorized railroad."

That franchise rights when granted by constitutional provisions after being accepted and acted upon can not be impaired by later constitutional modifications is indicated in the case of *Russell v. Sebastian*, 233 U. S. 195, 58 L. ed. 912, 34 Sup. Ct. 517, L. R. A. 1918E, 882, Ann. Cas. 1919C, 1282: "Before the constitution of 1879, the right to lay pipes in streets rested in grant from the legislature. It could delegate to the municipality, or itself exercise, the power. Experience had produced the conviction that this authority was abused; that favoritism had fostered monopolies and restrained the competition that was then thought to be desirable. In order to terminate these evils, the unique plan was decided upon of making street franchises, for the purpose of supplying water and artificial light, the subject of direct grant by the constitution itself without requiring any action on the part of the legislature to give it force. * * * That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the federal Constitution, is not open to dispute in view of the repeated decisions of this court. * * * The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light. This would involve, in the case of waterworks, the securing of sources of supply, the provision of conduits for conveying the water to the municipality, and the permanent investment in the construction of reservoirs with suitable storage capacity; and, in the case of gas works, the establishment of a manufacturing plant on a scale large enough to meet the demands that could reasonably be anticipated. But waterworks and gas works constructed to furnish a municipality with water or light would, of course, be useless without distributing systems; and the right of laying in the streets the mains needed to carry the water or gas to the inhabitants of the community was absolutely essential to the undertaking as a practical enterprise. This, the constitutional provision recognized. It was clearly designed to stop favoritism in granting such rights, not to withhold them. * * * The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we can not doubt that the offer was accepted. * * *

We conclude that the constitutional amendment of

1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair this right, and that the company was entitled to extend its mains for the purpose of distributing its supply to the inhabitants of the city, subject to the conditions set forth in the constitutional provision as it stood before the amendment."

That municipal corporations under the constitution of Ohio may by ordinance fix the terms for public utility service which continue during the franchise period is decided in the leading case of *Lima v. Public Utilities Commission*, 100 Ohio St. 416, 126 N. E. 318, P. U. R. 1920C, 930: "The constitution of the state as amended in 1912 (section 4, art. 18) expressly authorizes municipalities to enter into contracts for the product or service of any public utility, and it must be conceded that the acceptance by the utility company of the price and terms prescribed by an ordinance of a municipality completes a contract between the municipality and the utility company which is now authorized by the express terms of the constitution. This court held in the recent case of *Ohio River Power Co. v. City of Steubenville*, 99 Ohio St. 421, 124 N. E. 246, that where the price of electric current for light and other purposes is fixed by ordinance, and the company duly files its written acceptance thereof, such ordinance and acceptance constitute a contract between the municipality and the company, binding on both parties during the term named in the ordinance."

To the same effect the court in the leading case of *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250, said: "The constitution of 1909 did not revoke and terminate existing user of the streets under Act 264 of 1905. The constitution did abrogate the law of 1905, but it did not and could not revoke existing contracts under that act arising out of beneficial user of the streets for public utility purposes. Constitutional provisions, as well as legislative enactments, must be held prospective in operation only, unless they carry upon their face an intention to be retrospective. It would not help, however, to hold the constitutional provision retrospective, for the reason that contract rights are not subject to impairment by later constitutional provisions any more than by legislative enactments."

After obtaining consent from the municipality to lay its pipe lines along the streets and contracting with the inhabitants to furnish them with gas, the company secured a property right which was not subject to be interfered with or destroyed by the action of the city in acquiescing in a similar action by a compet-

ing company when taken without proper authority, for as the court said in the case of *Natural Gas & Fuel Corp. v. Norphlet Gas & Water Co.*, 173 Ark. 174, 294 S. W. 52: "The defendant extended its pipe lines to the village of Norphlet, and obtained the right-of-way to lay its pipe lines along the streets and the public highways of the village. It then made contracts with the inhabitants of the village to furnish them with gas. These acts gave it a property right, which it had a right to protect from invasion in the courts. The defendant had the right to supply gas to the inhabitants of the village through pipes and mains laid in the streets and public highways as then constructed upon performing the condition of its contract for service with the inhabitants of said village. This gave it a property right and not a mere license. In this view of the matter, no estoppel on the part of the town of Norphlet could affect its right. It did not in any manner acquiesce in the Norphlet Gas & Water Company constructing its lines in the town of Norphlet, and it did nothing whatever to estop itself from contesting the validity of the ordinance attempted to be granted to the water company. If the right it possessed at that time to furnish gas to the inhabitants of the town was a property right, it could not be taken away by estoppel on the part of the town. The town could not have taken away its rights even by passing an ordinance prohibiting it from furnishing gas to the inhabitants of the town. The town could only have taken away its right by granting an exclusive right to another company, to furnish gas to the inhabitants of the town."

When a municipal franchise is accepted it becomes a contract, provided the grantee complies with its terms and conditions within the time fixed, but in the event of a failure to do so, which by the terms of the contract works a forfeiture, the grant of the franchise never becomes a contract, because the grantee failed to comply with its conditions. In holding that the franchise was ineffective and that action under it could be enjoined by another competing company, who had secured a similar franchise, the court in *Northern Texas Utilities Co. v. Community Nat. Gas Co.* (Tex. Civ. App.), 297 S. W. 904 (aff'd. in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* [Tex. Civ. App.], 13 S. W. [2d] 184), said: "The first question to be considered is, Has the plaintiff, the Utilities Company, the right to maintain this suit, or does the right to question the validity of the defendant's franchise rest alone with the city of Vernon or the state of Texas? This question is answered in plaintiff's favor

by the holding in the case of *Lindsley v. Dallas Consolidated Street Railway Co.* (Tex. Civ. App.), 200 S. W. 207. * * * The plaintiff's right to maintain the suit for an injunction is by those decisions made to depend upon the fact that plaintiff has legally acquired a franchise from the city to do the things which it seeks to enjoin defendant from doing. Pond on Public Utilities (third edition), section 186; see, also, 2 McQuillin, Munic. Corp., sections 800, 805, 806, and 26 C. J. 1046. * * * The fact that the contract between the parties is incorporated in full in the ordinance is to be commended rather than criticized, since an ordinance of this character in its nature is a contract. Pond on Public Utilities (third edition), sections 120, 121. * * * Moreover, it appears that within a reasonable time after the plaintiff secured the consent of the city commission to use the streets and lay pipe lines, it in good faith accepted the franchise according to its terms and commenced work. This constitutes a binding contract which the law upholds, Pond on Public Utilities (third edition), sections 144, 145, 146. We therefore conclude that the plaintiff had the right to institute the suit and that it has a valid franchise. * * * We think section 13 of the ordinance is self-enacting, and the failure of Church to comply with its terms and conditions within the time limited worked a forfeiture of his rights, since it expressly provides that in the event of such failure it 'shall be forfeited and neither party shall have any right by reason hereof.' The provision as to the commencement and completion of the work is in the nature of a condition precedent, and the grant is rather a license and does not ripen into a contract or franchise until compliance on the part of Church with such conditions. Before Church or his assigns could enjoy the benefits and privileges granted, they must have performed the duties imposed within the time limited. The city had the right to make such a conditional contract (2 Fletcher, Cyc. Corp., section 1171), and its act in arresting defendant's employees and stopping the work is sufficient evidence that it had withdrawn its consent and repudiated the license, if, indeed, such withdrawal was necessary. Church's acceptance of the proposed franchise was also an acceptance of the terms and conditions upon which it was to become effective. Neither Church nor his assigns could claim its benefit without at the same time assuming its burdens and discharging its obligation."

Although the franchise provided for furnishing either natural or artificial gas, the courts hold that a charter permitting the

company to furnish gas would be construed to mean either or both, which is the effect of the decision in the case of *Corpus Christi Gas Co. v. Corpus Christi* (Tex. Civ. App.), 283 S. W. 281, as follows: "But it was sought mainly upon the ground that the gas company had no right whatever under its franchise to distribute natural gas, and that before it could do that it would have to seek an amendment to its franchise so as to authorize it to exercise that right. Such was the view of the trial court. That is error, for the franchise, specially above set out, gives the right to supply natural gas if found in the vicinity of Corpus Christi in paying quantities and piped into the city. In fact, a charter right to furnish gas would mean either or both natural and artificial gas. 28 Corpus Juris, p. 347. It must be remembered that a franchise to do a particular thing is a contract, and when even the least money is spent on it, it becomes a vested right, and creates a vested right to complete the same. This has many times been decided by our courts, as well as by the Supreme Court of the United States. It is the universal law of the land and is protected by the Constitution and laws of Texas and of the United States."

Where a street railway is granted a franchise, permitting it to use the streets of a municipality on the express agreement that it will construct viaducts whenever reasonably necessary at its own expense, this undertaking being contractual in form and effect continues to bind the company for the benefit of the municipality, which originally exacted the condition under its police power, and the public service commission is denied the authority to apportion such crossing expense or to relieve the street railway company from its original undertaking to construct and maintain all necessary crossings at its own expense. This principle is clearly established as follows in the case of *Kansas City v. Kansas City Terminal R. Co.*, 324 Mo. 882, 25 S. W. (2d) 1055: "It was recognized that Kansas City could not irrevocably bind itself to vacate the designated streets and alleys, but these vacations were deemed so essential to the main purpose of the ordinance that a provision for its nullification, in the event the vacations were not made, was inserted. It was provided, on the other hand, that upon the vacations being made as stipulated 'this ordinance shall become a binding contract between the parties after that date.' The ordinance as a whole is not only in form a contract, but it expressly declares on its face that it is a contract. Section 8 sets forth one of the terminal railway company's principal undertakings; therein it 'covenants and agrees'

that it will in the future construct viaducts whenever reasonably necessary for the public traffic, etc.; no sound reason has been advanced why the section should not be held to be 'contractual in its nature'; it was plainly so intended by the parties. * * *

At the time of the passage of the Union Station Ordinance, Kansas City was invested with the police power heretofore referred to, in respect to the crossings of its streets and alleys by railroads. *American Tobacco Co. v. Missouri Pac. R. Co.*, 247 Mo. 374, 157 S. W. 502. Wherein did Kansas City renounce any of that power in the enactment of the ordinance? In what respect did the ordinance limit the exercise of the power? A careful scrutiny of the ordinance as a whole leads us to conclude that the answers to these questions must be that Kansas City did not divest itself of any of its power to provide for, regulate, and control the crossings of its streets by the railroad, nor did the ordinance in any way limit the exercise of its power in that regard. * * * If a contract between a municipality and a railroad requires the latter to bear all the expense of a crossing, the contract is not in that respect a limitation of the police power; by its exercise the railroad could not be coerced into paying more. * * * As the terminal railway company's undertaking to build the crossings at its own expense represents in part the original cost of its railroad property, it can not be relieved to any extent of such obligation by the public service commission. There is another sound reason why the public service commission is without power to apportion to the terminal railway company any less than the whole of the expense of constructing the crossings covered by the ordinance contract. Kansas City had the absolute and unqualified power to either grant or withhold the right to construct and maintain a railroad across its streets. If it granted the right, large outlays would be required for the construction of crossings. From the provisions of the ordinance as a whole it abundantly appears that Kansas City did grant the right in consideration of the express promise of the terminal railway company to construct and maintain the necessary crossings at its own expense. The city having fully performed the contract on its part had, and has, a vested right to performance on the part of the company. Such vested right was not destroyed by the subsequent enactment of a police regulation of the character of the one involved."

This same court, however, in construing this same franchise with reference to the power of the municipality to fix rates for service by agreement with the company, sustained the power of

the public service commission or of the state to do so, because this function involves the exercise of the police power of the state, which could not be abridged or contracted away under the constitutional prohibition. And while the municipality was permitted to provide in its franchise with the company for street paving and extensions of its car lines, the court held that the city had no authority which the state was bound to recognize to fix rates in granting the franchise. This principle is well expressed in the case of *State v. Latshaw*, 325 Mo. 909, 30 S. W. (2d) 105, as follows: "The fixing of reasonable rates which a utility may charge for public service is the exercise of the police power of the state. * * * The fixing of public utility rates being an exercise of the police power of the state, it must follow that the legislature could not by contract, statutory enactment, or otherwise limit or abridge the right of the state to fix reasonable rates for public service, because to do so would be to abridge the exercise of the police power of the state, a thing which the constitution prohibits. * * * 'The public service commission shall have power to approve any such service-at-cost agreement and to make such orders from time to time as it may deem necessary to effectuate the same. Provided no city shall have power to enter into any such contract for a period or term of more than thirty years unless the same is approved by a majority vote of the qualified electors of such city voting upon such proposition when submitted at a general or special election held for such purpose; and no such contract shall give or grant or be held to create an exclusive franchise or privilege.' This act does not pare away any of the power previously given the commission in the fixing of rates in the first instance. It expressly provides that the value of the property used in the public service shall be determined by the public service commission. It also provides that, after the contract is made, the utility shall not commence operations thereunder until the contract has been submitted to the commission for its approval. This does not mean that the commission shall blindly approve the contract. The authority to approve necessarily implies authority to investigate the facts in order that an intelligent approval may be made. This statute provides that the cities named therein may enter into 'service-at-cost' agreements with common carriers with rates of fare dependent on the excess of revenue after deductions for operating expenses, maintenance, taxes, allowances for renewals and replacements, and a return on the value of the property used in or devoted to the public service as such value is

determined by the public service commission. It would be the duty of the commission, before either approving or disapproving the contract, to examine and consider all of the elements named in the statute which go to make up the rate, in order to determine whether or not the proposed rate would accomplish the purposes named in the statute. * * * From this it follows that the franchise contract entered into between Kansas City and the street car company does not prevent the state from fixing reasonable rates, whether such reasonable rates be higher or lower than the rates fixed by the franchise ordinance, and this may be done by the legislature itself or by its duly authorized agent.

* * * There is no doubt about the right of the city and the company to contract under lawful supervision as to the extension of car lines, street paving, etc., but they could not by agreement fix rates of fare to be charged by the street car company.

* * * The commission has exclusive power to determine and fix reasonable rates irrespective of the rates fixed by the franchise ordinance, but it has no jurisdiction to construe or enforce the contract as to extension of car lines, street paving, etc., or to try or determine an alleged breach thereof. When the application for increase in rates was filed with the commission, it was the official duty of the commission to determine and fix reasonable rates of fare, and leave the construction and enforcement of the contract to a court having jurisdiction to determine such matters. * * * The fact that the company violated the terms of the contract concerning matters about which it and the city had a lawful right to contract would not prevent the company from seeking an increase in rates, a matter about which they had no lawful right to contract. * * * The Public Service Commission Act, in authorizing the commission to determine and fix reasonable rates for public service irrespective of franchise rates, does not violate the contract or due process clauses of either the federal or state Constitutions."

§ 145. Vested interests and contract rights not subject to impairment by later constitutional provisions.²⁰—On this question the court, in *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250, stated: "Nor can contract rights and interests

²⁰ This section (§ 115 of second edition) quoted in *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250.

This section of third edition cited in *Northern Texas Utilities Co. v.*

Community Nat. Gas Co. (Tex. Civ. App.), 297 S. W. 904, *affd.* in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

that are vested by virtue of installing public utility plants under such rights be destroyed or interfered with even by a constitutional provision of the state. The rule prohibiting the impairment of contract rights is based on the federal Constitution, which is superior to the state constitution as well as to a statute or ordinance. In the case of *New Orleans Gas-Light Co. v. Louisiana Light &c. Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252, decided in 1885, the court held that a constitutional provision against the granting of monopolies or exclusive privileges did not have the effect of destroying or impairing the special privilege of conducting such a monopoly and enjoying an exclusive privilege by virtue of a franchise granted and accepted prior to the constitutional provision, the court saying: "The plaintiff claims to be entitled, for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporate bodies as may choose to contract for the same. * * * The article in the state constitution of 1879 in relation to monopolies is not, in any legal sense, an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy previously pursued of granting to private corporations franchises accompanied by exclusive privileges, as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactment, can not affect contracts which, when entered into, were within the power of the state to make, and which, consequently, were protected against impairment, in respect of their obligation, by the Constitution of the United States. A state can no more impair the obligation of a contract by her organic laws than by legislative enactment; for her constitution is a law within the meaning of the contract clause of the national Constitution. And the obligation of her contracts is as fully protected by that instrument against impairment by legislation as are contracts between individuals exclusively.'"

§ 146. Franchise rights may be modified by mutual agreements.²¹—The parties to the franchise contract may as a matter of course modify it by mutual agreement, and after having agreed to exchange one franchise for another, or having accepted an extension of a franchise, the municipal public utility can not question the conditions of the second franchise or the terms upon which the extension was granted and accepted, for as the court in the case of *Public Service Commission v. Westchester St. R. Co.*, 206 N. Y. 209, 99 N. E. 536, said: "When the village granted appellant's predecessor an extension of its franchise, it had the right, as a consideration therefor, to exact suitable conditions and agreements from the company in the interest of its inhabitants. There is no doubt that the rate of fare to be charged to and from points in the village was a matter of such municipal and public interest that the municipal authorities might bargain with reference thereto. Therefore the grant of the new franchise on the condition and consideration, amongst others, of a five-cent fare between the points now involved, and the acceptance by the company thereof and its agreement to observe all the 'conditions, regulations and restrictions' thereof, made a valid contract."

In the case of *Lutes v. Fayette Home Tel. Co.*, 155 Ky. 555, 160 S. W. 179, the well-defined principle of the right of the municipality with the consent of the municipal public utility holding the franchise to modify the terms thereof is recognized as the authority for permitting the municipality to release the defendant telephone company from its guaranty as to rates, the court saying: "Furthermore, the question is not an open one in this state, since it has been squarely decided in favor of the power in * * * three cases.²² * * * This is not a case where the municipality is undertaking to change the provisions of a contract against the will of the other contracting party. In cases of that character it is universally held that the contract can not be changed since to do so would impair its obligation. * * * Instead of agreeing to the change, the city of Lexington could have required the Telephone Company to carry out the original

²¹ This section (§ 116 of second edition) cited in *Van Horn v. Des Moines*, 195 Iowa 840, 191 N. W. 144.

This section of third edition cited in *Northern Texas Utilities Co. v. Community Nat. Gas Co.* (Tex. Civ. App.), 297 S. W. 904, *affd.* in *Community Nat. Gas Co. v. Northern*

Texas Utilities Co. (Tex. Civ. App.), 13 S. W. (2d) 184.

²² *Cumberland Tel. & T. Co. v. Hickman*, 129 Ky. 220, 33 Ky. L. 730, 111 S. W. 311; *Louisville Home Tel. Co. v. Louisville*, 130 Ky. 611, 113 S. W. 855; *Gathright v. Byllesby*, 154 Ky. 106, 157 S. W. 45.

contract, notwithstanding it became burdensome to the Telephone Company by reason of subsequent developments.²³ * * * And, so long as it was in force, any citizen had the same right.²⁴ * * * But, where both parties to the contract agree to its modification, there is a new contract, which either the city or the citizen may enforce."

Modification of the terms of the franchise by the mutual consent of the parties to it and in accordance with its terms, whereby the question of the reasonableness of rates may be arbitrated with a view of changing the rates fixed in the franchise, as well as other features of it, is permitted in the well-reasoned case of *Poggel v. Louisville R. Co.*, 225 Ky. 784, 10 S. W. (2d) 305, where the court said: "They contend that the city and the railway company can not agree to abolish the franchise granted by the state. There is no provision for the abolishment of the franchise found in the ordinances, but there is an agreement as to the modification of the franchises, relating to the term for which they shall run. It has been said by the courts so many times that repetition is unnecessary that a franchise granted by the state constitutes a contract between the state and the one receiving the franchise. If it be a contract, and if the rights of the state have been vested in the city of Louisville by the provisions of the constitution and the laws enacted pursuant thereto, we do not know any law that takes such a contract out of the general rule that it is subject to modification by the consent of all parties who are interested. * * * These provisions are followed by another to the effect that, when the company desires a change in rate, it may file the proposed change with the general council for its consideration and shall at the same time file a copy of the proposed change with the board of public works, and shall leave same on file for sixty days. If within the sixty-day period the rate shall have been approved, or shall not have been acted on by the general council in whole or in part, the whole, or part so approved, or so not acted upon, shall take effect as proposed. * * * As we read the ordinance, it does not deny the general council any power that it has to regulate rates by ordinance. The power to do so is specifically reserved. * * * The general council is vested with power to fix rates, and the fixing of rates involves a determination of invested capital, and it may be that these pro-

²³ *Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240.

²⁴ *Cumberland Tel. & T. Co. v. Hickman*, 129 Ky. 220, 83 Ky. L. 730, 111 S. W. 311.

visions of the ordinances are to enable the city to keep a line on the amount of invested capital, as well as the necessity for its investment. That the ordinances contain no language which would justify a construction that the city is lending its credit to the railway company is obvious. * * * Arbitration has always been favored by the courts. It is provided that, when the railway company engages in operating practices not approved by the board of public works, the dispute shall be submitted to arbitration. * * * It is true that a city can not delegate to such committee or officer the power to decide upon legislative matters properly resting in the judgment and discretion of the council. The ordinances in question do not delegate to the board of public works the power to decide upon legislative matters that rests in the judgment and discretion of the general council."

In the interest of the public service and for the benefit of all parties concerned, the court will permit the modification of a franchise expressly providing for street car service so as to include or permit of the substitution of motor vehicles in lieu or in addition to street cars. In permitting this change in the nature of the service and the modification of the franchise necessitated by the change, a citizen does not have the right to object, although removing the rails from the streets required the repair or replacement of the pavement, which the courts hold may be at the expense of the property owners. This principle is established on the theory that the method of conveyance, as well as the motive power, is incidental to the public service, and if this is benefited by the same it is justified, for as the court said in the case of *Russell v. Kentucky Utilities Co.*, 231 Ky. 820, 22 S. W. (2d) 289, P. U. R. 1930B, 400: "This case involves the right of a municipality by resolution, accepted by a street railway company, to change the terms of a franchise and permit the substitution of motorbusses for electrically operated street cars. * * * Section 1 of this resolution provides that the company shall not be required to operate street cars on certain named streets 'so long as busses are operated by' the company on named streets. Section 2 gives the right to the company to operate busses over certain streets with fixed termini. Section 3 declares that 'the operation of busses on the streets named in the last paragraph of the first section of this resolution shall be a compliance with section 10 of the franchise granted by the city of Paducah to the Paducah Railway Company on April 4, 1919, and the operation of busses on said streets is hereby declared to

be in lieu of the operation of street cars on' certain named streets. * * * . It is charged in the petition * * * that the city permitted the company to remove its rails from certain streets and after removal required construction of the streets at the expense of the property owners, and, in turn, allowed the company to operate busses in lieu of street cars over those streets * * * . It will be observed that, in vesting municipalities with the power to grant public utility franchises, there was no restriction as to the terms except duration of time. * * * It has uniformly been held that the right so to change the terms of the franchise exists, although there may arise cases where the peculiar amendments are interdicted by the constitutional limitations on the powers vested in municipalities. * * * That case followed *Lutes v. Fayette Home Telephone Co.*, 155 Ky. 555, 160 S. W. 179, involving an agreed change in telephone rates, in which case it was also held that a citizen of a municipality has no vested right in the scale of charges agreed upon as that is wholly a matter of contract between the legislative body of the city and the public service corporation. * * * The purpose and object of the franchise involved in this case was to provide for the rapid and convenient transportation of the public. That was the basic right granted. The motive power or method of propulsion of the vehicle is subordinate or subsidiary. It is but the means of making the franchise effective. * * * If busses be used for the transportation of passengers, there is no additional servitude on the streets or obstructions to the free and safe use of the streets by other vehicles. On the contrary, the streets are relieved of trolley poles and wires and the imbedded rails, more or less dangerous. It can hardly be said that the operation of the busses is more dangerous or obstructive than the operation of electric street cars on the thoroughfares. The problem is one of distinction between the essence in which the permanent value lies—the use of streets for transportation of passengers for hire—and the incidents of that franchisal right which are subject to change by agreement, viz. the facilities to be used. The case is analogous to the line of cases rendered several years ago during the transition from horse cars. Electric street railways are nothing but an improvement upon the railways propelled by horses or mules. * * * To meet the demands of modern life, the courts held the right of substitution existed, unless the franchise clearly and explicitly confined the motive power to horses or to some mechanical means. Thus

in *Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. 838, it was held that electricity may be used as the motive power of street railway under a statute authorizing the use of 'horse, animal or other powers * * * except the force of steam,' although at the time the act was passed such railways were run exclusively by animal power as the method of operating them by electricity had not been invented. * * * In the comparatively recent case of *Denny v. Brady* (Ind. Sup.), 163 N. E. 489, 490, a contest arose between the receiver for the Street Railway Company of Muncie, Ind., and certain operators of motorbusses on the streets of that city. It was contended that the company's charter authorizing it to operate street railways was not sufficiently comprehensive to include the operation of motorbusses. It was held that the street railway corporation had authority to operate motor vehicles for the transportation of passengers for hire without amending its articles of incorporation. * * * The court concludes that the contract thus entered into by the city and appellee as an amendment to the original agreement is not at variance with the constitutional grants and is therefore valid."

Where the municipality and the other party to the franchise agree to a modification of its terms by an extension of the time of performance, the municipality is bound by the terms of the modified contract, especially where the modification was made for the benefit of all parties, including the inhabitants of the municipality, in securing a gas supply for them. This principle is established and discussed as follows in the case of *Corbin, Kentucky v. Joseph Greenspons Sons Iron & Steel Co.*, 52 Fed. (2d) 939: "It is of course true that a franchise granted by a city for a valuable consideration is a contract, and it necessarily follows that a city, having the right to make such contract, may change it with the consent of the other party. Whether any substantial change would be upheld unless supported by a consideration we do not for the present consider. * * * Before the expiration of the year from the date of the passage of the original ordinance, the city adopted another ordinance granting a six-month extension of time to Dulin in which to form an organization and commence business. * * * Even if it were not within the power of a city to waive a provision put into a franchise for its benefit, there are considerations in the present case which, in our opinion, justified the extensions. The city had no gas supply. It had sold a franchise, but the purchaser

had not been able to furnish, or at least had failed to furnish, the gas. The time in which the purchaser was required to commence business was about to expire, and it requested an extension of the time. No one else apparently desired to furnish the gas; certainly no one was in position to furnish it more quickly. The city, being anxious to obtain gas for its citizens, granted an extension to the holder of the franchise, believing presumably that a supply of gas would be obtained in that way more quickly than in any other. These public considerations, in our opinion, were a sufficient consideration for the extension. * * * Before the expiration of the second extension, the city attempted to revoke it by ordinance adopted April 1, 1930, for the reason, as stated in the ordinance, that the extension was obtained by false representations. The answer of appellants set up and relied upon this ordinance as a defense to the action. It is hardly necessary to say that, in the absence of a power reserved in the resolution granting the extension, the city could not revoke it without a judicial determination of the rights of appellee. It was open to appellants to claim, and they have claimed in this action, that the extension was obtained by false representations. Issue was joined in the proofs upon these claims, but obviously appellants were not entitled to a decree thereon in their behalf, unless it were shown by clear and convincing evidence that the representations related to a material fact, were known to be false by appellee, were not known to be false by appellants, and were relied upon by appellants in granting the extension. Without detailing the evidence relating to these various claims, including appellant's knowledge of the Freeman Company, its purposes and aims, it may be stated that the court below would not have been justified in setting aside the extension upon the ground of fraud or misrepresentation."

§ 147. **Regulation by commissions.**—An interesting discussion of the effect of creating public utility commissions and the extent of their power of regulation over existing franchises is found in the case of *Vincennes v. Vincennes Traction Co.*, 187 Ind. 498, 120 N. E. 27, P. U. R. 1918F, 415: "This ordinance was passed pursuant to general powers conferred upon municipalities by the legislature, and on its acceptance by appellee's grantor it became in its nature a contract right, alike binding upon the state, municipality, and the utility. *Williams v. Citizens R. Co.*, 130 Ind. 71, 73, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. 201; *Grand Trunk Western R. Co. v. City of South Bend*, 227 U. S. 544, 556, 33 Sup. Ct. 303, 57 L. ed. 633, 44 L. R. A. (N. S.) 405;

Chouquette v. Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; *Baumgartner v. City of Mankato*, 60 Minn. 244, 62 N. W. 127. * * * It will be observed from an examination of these enactments that the state not only created street railway companies as a means of travel germane to street uses, but gave them the right to occupy the streets of cities with their tracks upon first obtaining the consent of the common council. The common council of the city of Vincennes consented to the use of its streets for street railway purposes. By such consent the condition precedent to the use of the streets by the company was performed; consequently we must regard the permit or franchise given to the company to use the streets as coming from the state. *Grand Trunk Western R. Co. v. City of South Bend*, *supra*. But the responsibility of making the contract was delegated to the city. An inspection of this instrument will disclose many stipulations, in character regulatory, and having to do with the manner of laying tracks, with reference to street grades, keeping the tracks in repair, running of its cars, etc.; yet there is no provision requiring the company to maintain and not abandon a double-track system in case of such installation. Considering the contract as a whole, it plainly indicates the intention of the parties to let traffic determine the necessity for double tracks, thereby involving the question of reasonable service. * * * In 1913, in view of existing conditions generally over the state regarding municipal authority concerning the various utilities then operating, the legislature deemed it wise to establish a more uniform system for the regulation of utilities and thereupon created the Public Service Commission of Indiana, and conferred upon it all the powers of control heretofore enjoyed by the municipalities save and except such control as is reserved to municipalities over streets by section 110, Acts 1913, p. 167. But under this section of the act provision is made whereby the utility may, if it feels aggrieved at any action of the common council, or if the municipality shall feel aggrieved at any action of the utility, have the matter heard by the public service commission. In view of what we have said regarding the ordinance in question, and the claimed effect of the removal by appellee of one of its tracks, we are required to hold that the question between appellant and appellee is one of service, and in such cases the procedure pointed out by the section 110, *supra*, and other sections of the act referred to therein, requires the matter to be first submitted to the commission."

While the rate for public utility service may be subject to regulation by the public service commission, the franchise rate remains until changed with the approval of the commission. This well-recognized principle is established in the case of *Empire Natural Gas Co. v. Stone*, 121 Kans. 119, 245 Pac. 1059, P. U. R. 1926D, 447, where the court said: "These cases were decided in 1904 and 1905. They established the legal right of the Wichita Natural Gas Company to lay its pipe line in the public highway without the consent of the defendants. However, the right of the Wichita Natural Gas Company to lay its pipe line in the public road might have been disputed by the defendants to the extent of compelling litigation for the purpose of determining the matter. By the contract, the company obtained the consent of the defendants to lay the pipe line in the public highway without dispute or contention. It is not necessary to determine whether or not that furnished a sufficient consideration for the contract. The defendants contend that the rate of twenty-seven cents a thousand cubic feet was in effect at the time the Public Utilities Law was enacted, and by that law became the legal rate. * * * The rate in controversy in this action was in effect under the contract when the Public Utilities Law was enacted. By that law, that rate became the legal rate, and it can not be changed without the consent of the public service commission. No order of the public utility rate-regulating body of this state has been made concerning the rate to the defendants or to persons similarly situated. A somewhat similar case just decided is *Empire Natural Gas Co. v. Thorp* (Kans.), 245 Pac. 1058. What was there said concerning the right of the plaintiff to change the rate to the defendant in that case applies with equal force in the present action, and need not be here repeated. The plaintiff can not, without an order from the public service commission, change the rate charged for natural gas furnished to the defendants."

In holding that the public service commission has the power to regulate rates because such power is reserved to the state and for the further reason that the franchise contract provided for it, the court in the case of *Tonopah Sewer & Drainage Co. v. Nye County*, 50 Nev. 173, 254 Pac. 696, P. U. R. 1927C, 748, said: "There is no longer any question but that a state may enlarge, modify, diminish, or set aside the acts of a municipality or one of its political subdivisions, without their consent. This is based upon the theory that the state is supreme and the action of the state in so doing is binding upon the municipality or political subdivision. * * * It then follows that the public service

commission, in establishing the rate on the public buildings in question here, acted not only in accordance with the power vested under the acts creating it, but in accordance with the contract itself. Under the power reserved to the commission by the ratified contract, there can be no question that the commission had jurisdiction to change the rates for private buildings, and the very same right in the very same terms exists as to the public buildings enumerated."

While the powers of the public service commission cover all matters of rendering service, they do not include questions of paving and changes in the grading of streets, which are purely municipal and local, over which the commission has no control, under the laws of Virginia, as is indicated in the case of *Portsmouth v. Virginia R. & Power Co.*, 141 Va. 54, 126 S. E. 362, for as the court said: "The prohibition against occupying the streets of the city of Portsmouth without the consent of the council is found in the charter of the company, the charter of the city, the constitution, and the general law. This power to give such consent necessarily implies the right to refuse it, and this in turn implies a power to attach appropriate conditions thereto; among which are conditions which are suggested by the changes in the surface of the streets directly caused by the new construction. * * * A careful scrutiny of this language and of all of the statutes of the state conferring jurisdiction upon the commission, shows conclusively that the powers of the commission relate only and always to the performance of the public duties of such public service corporations. They do not relate to the public duties of municipalities. * * * With this fair construction in mind, we find it impossible to follow the commission in its conclusion that this duty of paving is a public duty of the company, and hence subject to the supervision and control of the commission."

Where the street railway system was prevented from raising its fare under a franchise provision fixing the same, it will not be permitted to abandon its service, nor any part of it, because the franchise specifically provided for the service and fixed the rate which remains binding on both parties in the absence of legislative action by the state, for as the court said in the case of *Georgia Power Co. v. Decatur*, 168 Ga. 705, 149 S. E. 32, P. U. R. 1929C, 460 (aff'd. in 281 U. S. 505, 74 L. ed. 999, 50 Sup. Ct. 369, P. U. R. 1930C, 241): "Now that the Georgia Power Company can no longer attack the contract, it proposes to abrogate the terms thereof by surrendering its permit, or franchise, to the

city of Decatur, and tear up and remove its rails; and the notice already referred to was given to the city of Decatur by the Georgia Power Company of its intention to surrender the franchise and cease operation. It was then that the present injunction was filed by the city of Decatur against the Georgia Power Company. * * * The terms of this ordinance and contract in pursuance thereof show that it was to be a permanent operating contract between the street railway company and the city of Decatur. * * * To allow the plaintiff in error to surrender its franchise and permit and tear up its track would destroy the very terms of the contract itself. It is not so much the franchise that we are dealing with but the specific contract made in pursuance thereof. The terms of it are that the company will 'never' charge more than five cents for one fare, and that it will maintain the track in a substantial and safe manner and operate it with rolling-stock. When this contract was before the Supreme Court of the United States (262 U. S. 438, 43 Sup. Ct. 615, 67 L. ed. 1065, *supra*), that court said with reference to the duration of this contract that 'this contract would remain effective until there should be conflicting legislative action.' * * * The line sought to be abandoned in the city of Decatur is a part of a large street railway system operated by the Georgia Power Company, and the company seeks to abandon the part of this line in Decatur. This, under the terms of its contracts, it can not do. *Fort Smith Light & Traction Co. v. Bourland*, 267 U. S. 330, 45 Sup. Ct. 249, 69 L. ed. 631. * * * The parties having entered into an express contract as to what the fare should be it is immaterial whether it is confiscatory or discriminatory. Having held according to the ordinance of the city of Decatur of March 3, 1903, and the express contract in pursuance thereof entered into April 1, 1903, that the Georgia Power Company can not surrender its franchise or permit and abandon its line and tear up the tracks from the street, the other questions involved in this case were decided when this contract was before the court in *Georgia Railway & Power Co. v. Decatur*, 153 Ga. 329, 111 S. E. 911, *supra*."

This same court further denied a public utility the right to sell an unprofitable branch of its business to an irresponsible company, which would be unable to perform the duties required by the franchise, because to do so would be the equivalent of permitting it to discontinue a portion of the service required to be performed by the franchise, which required a single company to provide electric power and light service, as well as to

maintain and operate a street railway system. This construction of duties is in harmony with the terms of the franchise and the rule requiring all franchises to be construed in the interest of the public and against the company. This principle refusing the company the right to sell one branch of its business is established in the case of *Georgia Power Co. v. Rome*, 172 Ga. 14, 157 S. E. 283, as follows: "Irrespective of any rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory (and we are not now holding that the Georgia Power Company has or has not the right—such not being necessary to decide in this case—to abandon its street railway property in Rome without also surrendering its light franchise), the Georgia Power Company may not lawfully, without the consent of the city of Rome, dismember its street railway system therein by chopping off each offending or unprofitable member one at a time, and thus render the street railway body helpless and useless, thereby evading its duty and obligation to the city to maintain and operate the street railway system therein under the franchises granted, accepted, and retained by it from the city, *Macon Railway & Light Co. v. Corbin*, 155 Ga. 197, 116 S. E. 305. * * * The statute does not contemplate the sale or transfer of the property to a dummy or irresponsible corporation unable to perform the obligations to carry on the business under the franchise, nor does it contemplate the sale or transfer of the property when it is the obvious purpose of the transaction to ultimately abandon the property and thus evade the duty to maintain and operate the same. Under the admissions and facts of the case, the judge was authorized to find, on the hearing, that the sale and purchase proposed of the street railroad property was not such sale or transfer as is provided for by the statute permitting the sale and transfer by street railways of their railroad franchises and property. * * * The light business was a mere incident to the railroad business, but neither could successfully operate without electric power. During this time, and for a period of about thirty years, these companies, by the consent of the city, under a single and joint ownership of the franchises to operate a railway and light business in the city and for the purpose of operating the same, erected upon the streets of Rome, by its consent, the necessary distributing system, including poles, wires, cross-arms, and other adjuncts. The right to operate the railroad business and the right to operate the light and power business, by long usage and under a single ownership and joint

operation, have become conditioned one upon the other, intertwined, interlocked, and interdependent. In the meantime the city has dealt with these companies and granted them concessions as though their rights and franchises and business thereunder were a single and entire enterprise. * * * In the light of the facts of the case and the foregoing authority, keeping in mind the familiar rule that franchises are to be construed strictly and that construction adopted which works the least harm to the public, the conclusion is reached that the court did not err in holding that the street railroad franchises and system in Rome and the light and power franchises and system are conditioned one upon the other and so intertwined and interlocked that the same are interdependent and inseparable; that the Georgia Power Company now holds each under one merged and uniform franchise, authorizing and requiring it to furnish both street railroad and light and power service in the city; and that, for all intents and purposes, the street railroad, light and power system in Rome is one company, one franchise, one business. * * * A fairer construction of this statute to the public, and a more reasonable interpretation in view of the nature of street-railroad business at the time it was adopted, is to hold that the same does not authorize a street railroad company to sell its railroad property separately from its light and power property. It is therefore decided that the Georgia Power Company may not, under the statute, split its street railroad, light and power franchise in Rome by selling its railway property and retaining its light and power property in the city."

Under the power to regulate and control public utilities, a railroad commission has not the authority to permit a public utility, providing light and power service, as well as street railway service, to abandon the latter service because its operation was unprofitable; nor could the commission permit the company to substitute bus service for its street railway service. This principle is based on the proposition that a franchise contract must be performed according to its terms and that neither a court nor a commission has the power or authority to materially change its terms by providing for a different service or by permitting the abandonment of a part of the service where the franchise provided for a number of lines of service. This principle is clearly expressed as follows in the case of *Spartanburg v. South Carolina Gas & Electric Co.*, 130 S. Car. 125, 125 S. E. 295: "It has been adjudged by this court that the ordinance accepted in writing is a binding contract and must be enforced,

even as to the suburban lines which lie outside of the city. * * * It will be observed that the power claimed is to 'regulate, supervise, and control.' That refers, and can only refer, to a going concern. It does not, in any way, pretend to give the commission the power to annul or destroy the operation of public utilities. The legislature did not pretend to give to the railroad commission nor could it have given to the railroad commission, or to the courts, the power to destroy or impair the obligations of a contract. * * * The respondent admits that its electric light and power franchise is valuable and it is a paying business. If the street railway does not pay with all the advantages it derives from its electric light and power adjunct, then an electric railway alone must fail. It is inevitable that Spartanburg must be without a street railway, if the respondent be allowed to keep the one and destroy the other. They stand or fall together as an entire contract. * * * The proposition of respondents, that a bus line had been substituted for the street railway, is ineffective. Neither the railroad commission nor the courts are authorized to substitute for the thing contracted for something else that is 'just as good,' if it be just as good. Governmental agencies have no right to substitute one contract for another. It is adjudged that the showing of the relators is sufficient, and that the writ of mandamus do issue, requiring the respondent to restore its lines and operate the same according to law."

This same court reiterated this proposition by holding that, where the combined business of a public utility company rendering different lines of service was successful, the company must continue to furnish all the lines of service required by its charter, so long as it enjoyed the benefits of its charter in any way and that it might not abandon its railway service and retain its electric light and power privileges. This principle is clearly enunciated as follows in the case of *State v. Broad River Power Co.*, 157 S. Car. 1, 153 S. E. 537, P. U. R. 1930A, 65: "We are in full accord with the views expressed by the referee on this question, that the two corporate respondents should be treated as one corporation, and think the same amply supported by the record of the case, but as stated at the outset, we do not agree with the referee in holding that the petitions of the petitioners should be dismissed. * * * It is not disputed by the respondents that the business conducted by the company, with the exception of that of the street railway, has been profitable, but respondents contend that on account of losses sustained on that

business the company had the right to abandon the street railway. The petitioners deny this alleged right to the respondents, and contend that under acts of 1891, granting the franchise for the combined public service operations of respondents the electric street railway service is inseparably linked with the electric light and power (and gas) services and may not be separately abandoned. * * * It is further shown from the record that the business of the consolidated company has been very successful. * * * As contended by petitioners, a public service corporation must perform all the services authorized by its charter as long as it retains any of the benefits of the charter granted by the state; and the obligation must be determined by the productiveness of the corporation as a whole. * * * The criterion is the entire public business of the company. It being established that the electric railway service is inseparably linked with the electric light and power services, it is apparent that under these cases the company may be required to carry on the electric railway service as long as it retains the electric light and power privileges. * * * Therefore the company can not be permitted to abandon the electric railway service while retaining the electric light and power privileges. Furthermore, the electric railway service is connected with the electric light and power business and is inseparable from it by reason of the manner of construction and operation as well as by the charter and franchise contract. * * * In this connection, see the case of *Fort Smith Light & Traction Company v. Bourland*, supra, 267 U. S. 330, 45 Sup. Ct. 249, 250, 69 L. ed. 631. In this case the court discusses the question under the theory of 'direct contractual obligation' and also under the theory of a 'permissive franchise,' and under both theories reaches the conclusion that the light and traction company should not be permitted to escape the obligation it was under to operate the street cars on a certain line, even though the operation entailed a heavy loss. * * * But Mr. Justice Brandeis adds these words: 'But the constitution does not confer upon the company the right to continue to enjoy the franchise (or indeterminate permit) and escape from the burdens incident to its use.' * * * Applying these principles to the facts involved in the case at bar, that the Broad River Power Company got into its possession and control from the Columbia Railway, Gas & Electric Company \$4,000,000 net worth of property, and also the franchise valued at \$1,561,000, without paying any consideration for the same, and leaving the Colum-

bia Railway, Gas & Electric Company in an insolvent and helpless condition, unable to function, the conclusion is inescapable that the corporations are merged, and further that the Broad River Power Company should be held liable to carry out the obligation of the Columbia Railway, Gas & Electric Company to furnish electric street railway service. * * * Under the principles stated in these cases, it is clear that the company involved in the case at bar is bound by contract with the city of Columbia to carry on the operations contemplated thereunder, including the operation of the street electric railway against which alleged losses, if established, would afford no defense."

Where the municipality has the power to fix the rates either by an ordinance granting the franchise or by a later ordinance, which was authorized by the franchise ordinance, and which was done, the public utility is not in a position to question the rate on the theory that it violates the Fourteenth Amendment by depriving it of its property without due process of law. This principle is established on the theory that the municipality had the authority to prescribe the rates as a condition of granting the franchise, and is clearly enunciated in the case of *Central Kentucky Natural Gas Co. v. Mt. Sterling, Kentucky*, 32 Fed. (2d) 338, P. U. R. 1929E, 446, as follows: "The relief sought is an injunction against the enforcement of an ordinance of the defendant city passed October 4, 1927, by its board of councilmen, providing that the plaintiff, which had a franchise to sell natural gas in the city, should sell and supply same to consumers at not exceeding forty-two cents per thousand cubic feet. * * * The main, if not sole, reliance is on the position that the ordinance violates the Fourteenth Amendment. It was enacted on the same day that the ordinance granting the franchise was enacted, but subsequent thereto. * * * These provisions and this fact prevented the ordinance prescribing rates from amounting to a deprivation of plaintiff's property without due process of law. I do not understand that a prescription of rates, though unreasonable and confiscatory, to come within the inhibition of the Fourteenth Amendment, where provision is made for a judicial hearing and no penalties are prescribed for charging and collecting such rates pending such hearing. * * * It is the implication of what is here said that, if the statute had not made the action of the railroad commission 'an absolute finality,' but had provided for a judicial hearing as to the reasonableness of the rates fixed by it, neither its action nor the statute itself would have deprived the plaintiff of its property without

due process of law. * * * Here the ordinance complained of was enacted under, and in pursuance to, that granting plaintiff its franchise, which it had accepted, and to the terms of which it had agreed by such acceptance. That ordinance contemplated and provided that the board of councilmen of the defendant city should promptly enact an ordinance prescribing rates. It is true that it called for the prescription of reasonable rates. But the meaning was that the board should prescribe rates which it deemed reasonable without hearing or investigation. The only hearing and investigation as to the reasonableness of the rates prescribed which it contemplated was that to be had in a suit brought by the plaintiff complaining of the prescription and seeking a hearing and investigation for which provision was made. Provision was further made for an injunction in such suit against the enforcement of the rates prescribed and for the collection of certain rates pending the determination of such suit, the excess above the rates prescribed to be impounded. To all this the plaintiff agreed by accepting the franchise. No penalty whatever was provided for collecting rates in excess of those prescribed. Question is made as to whether the board of councilmen of the defendant city had power to prescribe plaintiff's rates. * * * But it is unimportant whether the board of councilmen of cities of the fourth class in this state have power generally to fix rates. They have power to grant franchises, and the power to grant a franchise includes the power to fix its terms, of which the rates to be charged may be one. As the rates to be charged could have been fixed in the franchise, so it would seem that the power to fix them by a subsequent ordinance reserved in the ordinance granting the franchise would be valid. Besides, it would seem that the plaintiff should be estopped to question the power to fix rates. Its franchise is built on the existence of such power. I am therefore constrained to hold that the ordinance complained of, notwithstanding the rates prescribed may be unreasonable and confiscatory, does not deprive plaintiff of its property without due process of law, in violation of the Fourteenth Amendment, and hence that this court does not have jurisdiction of this suit on this ground. * * * That franchise contemplated and provided that the board of councilmen of the defendant should, promptly, after the granting of the franchise, enact an ordinance prescribing rates which it deemed reasonable without hearing or investigation on its part. What it did in enacting the ordinance was what

was contemplated and provided for in the ordinance granting the franchise."

In a later case from this same jurisdiction of Kentucky, the federal court held that the power to regulate rates was with the municipality in cities of the third class, where the city in question belonged, and not with the railroad commission of the state. In the course of the decision the court set out the rule as follows in the case of *Kentucky Power & Light Co. v. Maysville, Kentucky*, 36 Fed. (2d) 816, P. U. R. 1930B, 505: "The Maysville Gas Company was organized by an Act of the General Assembly of Kentucky of March 1, 1854 (Loc. & Priv. Acts Ky. 1853-54, c. 370). Section 7 of the Charter provides: 'That said company may lay their pipes of every necessary kind, through any of the streets and alleys of said city, and furnish gas light to any person on such terms as the company and such person may agree upon; and such contract shall be obligatory, and may be enforced in any proper court in this Commonwealth. A contract may also be made in the same manner between the city of Maysville, or any corporation therein, and said company, which shall be enforced in the same way.' * * * It is seeking to enjoin the enforcement of an ordinance of the city of Maysville, undertaking to fix the rates which plaintiff may charge. If third-class cities have the power to regulate gas rates within their limits, then the ordinance may be attacked on the ground that it is violative of section 10 of article 1 and the Fourteenth Amendment to the federal Constitution. If the city does not have any such power, its attempt to exercise the power amounts to a taking of plaintiff's property without due process of law. See *City of Winchester v. Winchester Waterworks Co.*, 251 U. S. 192, 40 Sup. Ct. 123, 64 L. ed. 221. * * *

"The power to regulate rates of public utilities is inherent in every sovereignty. It is legislative in character and is a part of the police power. The state may, within limits, contract with a utility as to the rates to be charged, yet it may well be doubted if, under the modern rule, it can irrevocably surrender all regulatory power. Certainly no such surrender is to be presumed. On the contrary, every presumption is against any such surrender. A charter provision claimed to work such a surrender must not be so construed if any other construction is reasonably possible. * * * It does not seem to me, however, that the two charter provisions relied upon irresistibly compel the conclusion that it was the intention of the general assembly to forever surrender the power of the state, by legislative ac-

tion, to regulate the rates of the two companies referred to, and to leave the question of the reasonableness of such rates to be dealt with by the courts as the occasion might arise. A more reasonable construction is that these two charter provisions conferred upon the two corporations the right to make valid and enforceable contracts as to the rates to be charged, subject always to the rate-regulatory power of the state. *Southern Pacific Co. v. Campbell*, 230 U. S. 537, 551, 33 Sup. Ct. 1027, 57 L. ed. 1610, and cases there cited. * * * The charter of the Citizens Gas Light Company was granted April 19, 1886. Therefore the amendment of the charter of the Maysville Gas Company and the original charter of the Citizens Gas Light Company were both granted after February 14, 1856 (Pub. Acts Ky. 1855-56, c. 148), on which date there was approved an act of the general assembly of Kentucky, section 1 of which specifically provided: 'That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' * * * So if they ever had the right to contract with reference to rates, free of the control of the legislative department, that right was held subject to its revocation by the authority which conferred it. It must be admitted that the general assembly of Kentucky has provided for the regulation of gas rates in cities of the third class. The parties to this litigation are agreed on that point, but there is disagreement as to whether that power of regulation is vested in the railroad commission of Kentucky, under section 201e—1 of Kentucky Statutes, or has been delegated to the common council of cities of the third class in section 3290—5 of Kentucky Statutes. * * * Furthermore, the bill shows that the Maysville Gas Company and the Citizens Gas Light Company, subsequent to March 1, 1911, were, by consolidation under the laws of Kentucky, merged in the plaintiff, Kentucky Power & Light Company. This was a voluntary act on their part, and by the express provisions of section 556 of Kentucky Statutes they ceased to exist as corporations and the consolidated corporation became a single new corporation, and subject to all the laws of Kentucky relating to such corporations, including those relating to the regulation of their rates which were in force when the new consolidated corporation came into existence. * * * This section undoubtedly means that the railroad commission is not given jurisdiction over the rates of natural gas companies in any city where the rates are now regulat-

ed by local authority, or where the city under the law has the power of regulation. * * * A consideration of these two subdivisions of section 3290 leads me to the conclusion that the general assembly has conferred upon cities of the third class the power to regulate the rates to be charged by gas companies within their limits. If I am correct in this, then the rates of the plaintiff in this case may be regulated by the defendant city, and therefore plaintiff is clearly within the exception contained in section 201e—1, and the railroad commission has no jurisdiction over such rates."

In a still later decision of the federal court from this same jurisdiction of Kentucky, the court failed to find authority in the city of Louisville to control rates in the absence of an express statute to that effect, and decided that a federal question was involved in the matter of fixing rates for the Louisville Railway Company in the case of *Louisville, Kentucky v. Louisville R. Co.*, 39 Fed. (2d) 822, P. U. R. 1930C, 165, where the court said: "The same is true as to the grant of franchise rights to use the public highways of the state for the conduct of such public utility business. This latter power, over the granting of franchises, has been delegated to the cities of Kentucky by section 163 of the Constitution of 1891, and it has been held by the court of appeals of Kentucky that, in granting a franchise, it is proper for the city 'to provide the conditions under which, and the rates for which, the service should be rendered.' *Campbellsville v. Taylor County Tel. Co.*, 229 Ky. 843, 849, 18 S. W. (2d) 305, 308. This, however, is not an exercise of the rate-making powers of the state, nor does it necessarily create a contract bartering away the power of rate control residing in the commonwealth. It fixes a contract maximum; not a contract minimum below which service may not thereafter be required by properly constituted authority. *City of Noblesville v. Noblesville Gas & Imp. Co.*, 157 Ind. 162, 169, 60 N. E. 1032; *St. Cloud Pub. Serv. Co. v. City of St. Cloud*, 265 U. S. 352, 363, 44 Sup. Ct. 492, 68 L. ed. 1050. This view suggests the rather obvious distinction between the power of rate regulation, as such; the power to contract for a fixed rate over a definite term, which is the equivalent of a surrender of the rate-making power for such term and will be supported only by definite and express enactment (*Railroad Commission v. Los Angeles Ry. Corp.*, 280 U. S. 145, 50 Sup. Ct. 71, 74 L. ed. 234, decided Dec. 2, 1929); and the power to fix a maximum rate as a condition to the enjoyment of a franchise. * * * Thus, to the extent that the right of

subsequent valuation and rate determination is validly reserved as a condition of and concomitant to the granting of a franchise, the city purports to act, and is acting, in the exercise of delegated state power. When, subsequently, this reserved power is exercised, the source and validity of such action must by relation also be found in, and ascribed to, the delegation of state power in the matter of granting the franchise. * * * It is only when it affirmatively appears upon the record that the city acted in a purely proprietary capacity, and without a delegation of authority from the state, that jurisdiction is held to be lacking. Compare *Memphis v. Cumberland Tel. & Tel. Co.*, 218 U. S. 624, 630, 31 Sup. Ct. 115, 54 L. ed. 1185, and cases there cited.

* * * Reliance is placed upon section 2783 of the Kentucky Statutes, applicable to Louisville, providing: "The general council shall have power to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the constitution of Kentucky and the statutes thereof." This general provision lacks expression of an intent to delegate that authority which may only be delegated by express provision, and is not to be construed, we think, as including the power of rate control, but only as a delegation of such authority as is ordinarily exercised by municipalities in the conduct of their local affairs. * * * We are not inclined to rest our decision upon the finding that the power of rate regulation, per se, has in fact been delegated to the cities of Kentucky, but these dicta, and section 2783, lend color to the substantial and debatable character of the claim that the city acted in the exercise of such delegated state powers. That the case presents a real and substantial question under the constitution is enough. * * * Doubtless the general council and officers of the city believed the power of rate regulation to have been delegated to the city, and acted upon this belief, but that action might also have been predicated upon the power reserved in the franchise, and not solely upon the delegation of the power of rate control, per se. Upon either view, as we have seen, a federal question is presented."

The power of the state to regulate public utility rates is no longer questioned, and this is generally done through the public utilities commission although a rate provision may have been included in the charter where this was issued subject to the right of amendment or repeal. This principle is clearly enunciated in the case of *East Providence Water Co. v. Public Utilities Comm.*, 46 R. I. 458, 128 Atl. 556, where the court expressed

it as follows: "The plenary power of the general assembly, within constitutional limits to control and regulate the rates, service, etc., of a public utility is now not open to question. The exercise of such power of regulation is a part of the police power of the state which may be exercised by the state through the agency of a commission. *Public Utilities Commission v. R. I. Co.*, 43 R. I. 135, 110 Atl. 654. * * * The state did not, nor could it for an unlimited time, surrender its governmental power of regulating rates. In this connection it is also to be noted that the charter of the water company by general law (G. L. 1923, c. 248, sec. 79) was granted, subject to the power of the general assembly to amend or repeal the same at any time thereafter. * * * The water company had no power under the terms of its charter to make a contract in regard to rates which was not subject to legislative change. * * * The legislative power of rate making is a part of the police power of the state. If an increase of rates is permitted by the commission, it is true that as a result thereof a change is made in the maximum rate provision of the water company's charter. But this is a consequence of the exercise of the police power, and is not an amendment of the charter which requires special legislative action."

While indicating the injustice of permitting a public utility to be relieved from rate regulations fixed by its franchise because the state rather than the municipality at the time had the right to regulate rates by virtue of later statutory enactments, the court admits this to be the general rule in the case of *Western Oklahoma Gas & Fuel Co. v. Duncan*, 120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277, where the court said: "Prior to the passage of the act of March 25, 1913, the cities of the state were authorized to grant franchises and establish rates, but, since the adoption of the state constitution and the passage of the above-mentioned act, the exclusive power of regulating rates is vested in the corporation commission, and the cities of the state may not regulate the same, under its charter provisions. * * * While it appears to be unjust for a corporation or an individual to obtain a valuable right from a municipality to use its streets and alleys to establish its plant therein, and, as a consideration therefor, it is agreed, and the solemn agreement is written into the franchise, and, after the corporation or individual has established its plant, then it is permitted to repudiate the agreement, yet the courts have justified the cancelation of the agreement upon the ground that the municipality is but an arm of the

state, and, in a case where public utilities are performing services to the public, the state in the exercise of its sovereign power has the right to regulate the charges and rates therefor, and, in all the late decisions with regard to the question of rates to be charged by water companies, or heat, light, and power companies, the state or its corporation commission has the right to change, modify, or annul any provision looking toward furnishing free water, gas, light, or power."

The action of a public utility commission in denying a certificate which would permit a duplication of service in the same locality, resulting in an economic loss, impaired service, and probably an increased rate, will be sustained by the court as is found in *Junction Water Co. v. Riddle*, 108 N. J. Eq. 523, 155 Atl. 887, P. U. R. 1932B, 302: "There is nothing in the Public Utility Act to suggest that it was enacted for the benefit of those owning, operating, or controlling public utilities. * * * That the board's disapproval of franchises in some instances inures to the benefit of a public utility already operating in a particular municipality, does not indicate that approval was required for its especial benefit. On the contrary, it is required in the public interest and to insure adequate service by one utility, where, if there were more than one authorized to give the same service in the same locality, neither could supply adequate or satisfactory service, as neither could operate with profit if the business of the community were divided."

Where the policy of the legislature and the municipal authorities permitted the municipality to continue to control its public utility service under the terms of the franchise which had been granted under proper authority, the jurisdiction will not be held to have been transferred to the state commission, especially where the public utility itself had recently recognized municipal control of the matter by petitioning the municipality itself. This principle is established and discussed as follows in the case of *Franklin Light & Power Co. v. Southern Cities Power Co.* (Tenn.), 47 S. W. (2d) 86: "It is hardly to be conceived that, if the intent of the legislature in the passage of chapter 151 of the Act of 1909 was to revoke or annul the franchise or privilege granting power conferred so generally by the charters of municipalities, the policy of the legislature in this regard would have been uniformly continued thereafter. * * * This brings us to the consideration of the insistence to which the last-filed brief for petitioner in this court is chiefly directed, namely, that these powers of the town of Franklin, and like-chartered

municipalities, were abrogated, or transferred to the state railroad and public utility commission, by the Act of 1919. It has been seen that no such effect is recognized by the commission itself, and, again, it is only now, for the first time after ten years since the enactment, that such a claim has been advanced by the utilities themselves. And, as before noted, on the contrary—suggestive of a sort of analogy to the rule of practical construction by the interested parties to contracts—so late as June, 1929, the petitioner itself made an application to the town of Franklin in direct recognition of the powers it now denies.”

Where a franchise contract fixes the service rate, no relief is available to the company except by way of recourse to the corporation commission in the first instance. This is the well-established rule as indicated by the court in the case of *Henderson Water Co. v. Corporation Commission of North Carolina*, 269 U. S. 278, 70 L. ed. 272, 46 Sup. Ct. 112, P. U. R. 1926B, 666, where the court said: “The Henderson Water Company is the owner by assignment of a franchise to furnish to Henderson, North Carolina, a supply of water. The franchise, with a term of forty years, was granted in 1892 by the city, when it was a town, to certain grantees, from whom it came in 1894 to the Water Company, which was complainant below, and is appellant here. The ordinance provided a schedule of prices for water to be furnished beyond which the grantee could not go. Later the state of North Carolina created a corporation commission, having power to fix rates for public utilities of the state. * * * The commission heard the complaint, and March 29, 1923, ordered an increase of about one-half asked for, to take effect July 27, 1923, with the direction that after the corporation had tried the rates fixed for six months, it might apply again for such relief as the results would justify. The end of the six months’ test proposed was January 27, 1924. Without applying again to the commission, the Water Company, on February 22, 1924, filed this bill to enjoin the commission from continuing to enforce the rates fixed by the order made in the spring of 1923, on the ground that they were confiscatory. * * * The present case differs from the cases cited, in that when the Water Company applied to the corporation commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise, to furnish water at a low schedule of rates fixed therein. It was not entitled to any judicial relief from this situation, however inadequate the rates. *Columbus R. Power & Light Co. v. Columbus*, 249 U. S. 399, 63

L. ed. 669, 6 A. L. R. 1648, P. U. R. 1919D, 239, 39 Sup. Ct. 349; St. Cloud Pub. Serv. Co. v. St. Cloud, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492. Only by securing the waiver of the franchise rates by order of the corporation commission speaking for the state, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates. *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 939, 29 A. L. R. 1471, 43 Sup. Ct. 534. It was, therefore, plainly within the power and discretion of the commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go. No constitutional rights of the Water Company to be protected against confiscation would be infringed by such reasonable delay. We concur with the district court in the view that the Water Company should have applied for a resumption of the hearing after the test and exhausted its remedy there before a resort to this suit."

Where a contract for five-cent fares has been properly made and the question as to its validity and effect remains undecided because of a conflict between the jurisdictions created by the general Public Service Commission Law and the special Rapid Transit Act, which was enacted prior to the commission law although amended later, a decision of this question by the state courts should precede the taking of jurisdiction of the matter by the United States courts, for as the court said in the case of *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 73 L. ed. 652, 49 Sup. Ct. 282: "The transit commission has long held the view that it lacks power to change the five-cent rate established by contract; and it intended to test this point of law by an immediate, orderly appeal to the courts of the state. This purpose should not be thwarted by an injunction. Upon the record before us we can not accept the theory that the subways and elevated roads constitute a unified system for rate-making purposes. Considering the probable fair value of the subways and the current receipts therefrom no adequate basis is shown for claiming that the five-cent rate is now confiscatory in respect of them. The action below was based upon supposed values and requirements of all lines operated by the Interborough Company treated as a unit; and the effort to support it here proceeds upon a like assumption."

Where there is no statutory authority expressly granting a municipality the power to establish rates by contract and no construction of the state laws on the subject, the federal court

will not infer power in the municipality to regulate rates, and will sustain the action of the public utilities commission in fixing a reasonable rate. Where the rate, however, as fixed by the commission, is unreasonable or confiscatory, the federal court will not hesitate to set it aside for that reason, as was indicated in *Railroad Commission of California v. Los Angeles R. Corp.*, 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. 71, where the court said: "Appellee operates a street railway system and motor busses for the transportation of passengers in the city of Los Angeles and in other parts of the county of Los Angeles. Its cars are operated on tracks laid in the streets under authority of 102 franchises granted from time to time since 1886. * * * Seventy-three granted between November 28, 1890, and October 21, 1918, covering 113.41 miles, provide that 'the rate of fare * * * shall not exceed five cents.' Eighteen granted between March 2, 1920, and January 21, 1928, covering 12.33 miles, provided that 'the rate of fare * * * shall not be more than five cents * * * except upon a showing before a competent authority having jurisdiction over rates of fare that such greater charge is justified.' The remaining eleven, covering 10.5 miles, were granted at various times from 1886 to 1923; none of them provides that the fare shall not exceed five cents; but it may be assumed that under the provisions of the other ordinances a fare of five cents was made applicable over all lines. Prior to the decree in this case the basic fare charged was five cents. Maintaining that its existing rates were not sufficient to yield a reasonable return, the company, November 16, 1926, applied to the commission for authority to increase the basic fare to seven cents in cash, or six and one-fourth cents in tokens to be furnished by the company, four for twenty-five cents. The commission, March 26, 1928, made a report and by an order denied the application. A petition for rehearing was denied. June 22, 1928, the company brought this suit to have the rates and order adjudged confiscatory. * * * The court found that the rates will not permit the company to earn a reasonable return, and are confiscatory; and by its decree permanently enjoined the commission from enforcing them. The sole controversy is whether the company is bound by contract with the city to continue to serve for the fares specified in the franchises, it being conceded that the finding below respecting the inadequacy of the five-cent fare is sustained by the evidence. * * *

It is possible for a state to authorize a municipal corporation by agreement to establish public service rates, and

thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. 410; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 508, 515, 51 L. ed. 1155, 1160, 1163, 27 Sup. Ct. 762; *St. Cloud Pub. Serv. Co. v. St. Cloud*, 265 U. S. 352, 355, 68 L. ed. 1050, 1053, 44 Sup. Ct. 492. And where a city, empowered by the state so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. *Detroit v. Detroit Citizens Street R. Co.*, *supra* (184 U. S. 389, 46 L. ed. 608, 22 Sup. Ct. 410). And, in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates however inadequate they may prove to be. *St. Cloud Pub. Serv. Co. v. St. Cloud*, *supra*. This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613. Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the state from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the state to authorize the bargaining away of its power to tax. * * * Section 470 of the Civil Code (March 21, 1872) cited by appellants merely regulates procedure. Section 497 authorizes political subdivisions to grant authority for the laying of railroads in streets 'under such restrictions and limitations' as they may provide. Stat. 1891, p. 12. This is too general. The clause in section 501 (Stat. 1903, p. 172) providing that the rate of fare in municipalities of the first class 'must not exceed five cents' does not relate to the power to contract, and plainly has no application here because Los Angeles never belonged to that class. Section one of the Broughton Franchise Act provides that franchises 'shall be granted upon the conditions in this act provided and not otherwise.' The act requires

the sale of such franchises upon advertisement stating the character of the franchise or privilege proposed to be granted, but it nowhere expressly empowers the city to establish rates by contract. * * *

"The appellants invoke provisions of the city charter which are printed in the margin. But it requires no discussion to show that they are not sufficient to empower the city by contract to establish rates. * * * Appellants have failed to sustain their contention that the city was empowered to make such rate contracts. But assuming that the fares were established by the franchise contracts, we are of opinion that such contracts have been abrogated. The state had power upon the company's application, through its commission or otherwise, to terminate them. * * * November 30, 1918, the company applied to have the commission investigate its service and financial condition and for an order authorizing it to 'so operate its system and change its rates that the income will be sufficient to pay the costs of the service.' May 31, 1921, the commission found that the existing fares would not permit the company to collect enough to enable it to provide adequate service. See P. U. R. 1922A, 66, 90. And it made an order permitting a small increase. The company did not accept it, but applied for a rehearing. * * * There is no decision in the courts of the state as to the effect of the proceedings before and action taken by the commission, and therefore we are required to construe the applicable provisions of the local Constitution and statutes, *Denney v. Pacific Teleph. & Teleg. Co.*, supra (276 U. S. 101, 72 L. ed. 486, 48 Sup. Ct. 223). Under the state Constitution, art. 12, section 23, as amended November 3, 1914, and the Public Utilities Act of April 23, 1915, the commission has exclusive power to regulate rates. And section 27 of the act gave to street railway companies the right to charge more than 5 cents upon showing before the commission that the higher charge is justified. No distinction is made between rates established by franchise contracts and those otherwise fixed. Fares may not be changed without approval of the commission. The policy of the state is that all rates shall be just and reasonable (section 15), and the commission is directed, whenever, after hearing had upon its own motion or upon complaint it shall find that rates are unjust or insufficient, to determine the just and reasonable rates thereafter to be observed. * * * The proceedings before the commission and its orders clearly show that it twice took jurisdiction to determine just and reasonable rates. Its

order of May 31, 1921, by reason of the company's failure to put in the increased rates, never became operative and finally was vacated. The report and order of March 26, 1928, found that existing rates were just and reasonable, and in legal effect required the company to continue to observe them. The court below found the rates confiscatory, and appellants do not here question that finding."

§ 148. **Conditions of grant and acceptance.**²⁵—Unless all conditions properly imposed by the municipality are complied with no franchise rights are vested in the public utility, for as the court said in *Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp.*, 266 Fed. 625: "In the case now before the court the franchise contract expressly provided that, if the company did not complete the construction and place in operation the railway on or before the dates specified, 'the right herein granted shall cease and determine.' We are satisfied that the company did not comply with its contract. It did not construct and put in operation its railway within the time allowed it for the purpose, and because it did not do so its franchise automatically ceased and determined. The reasons put forward for not having complied with the contract in the affidavits presented to the court afford no excuse for the failure to perform. The parties to a contract are bound to perform it according to its terms, unless performance is rendered impossible by the act of God, by the law, or by the other party. Performance is not excused by unforeseen difficulties, or because it has become unexpectedly burdensome. That times were hard, that the company was in financial difficulties, that labor and materials had excessively advanced, and that it was impossible in a business sense to go ahead with the work, may all have been reasons which might have been addressed to the city in an appeal to have the time for the completion of the contract extended, but they afforded no legal excuse for the failure to perform."

Where an ordinance, attempting to grant a franchise, was not submitted to the electors for their approval, which was necessary to its validity, the municipality is not bound by estoppel because the franchise was void from the beginning and without effect, as is clearly established in the case of *Eureka v. Kansas Electric Power Co.*, 133 Kans. 238, 299 Pac. 938, as follows: "It may be stated at the outset that, since Ordinance No. 824 was not submitted to and approved by the electors of the city,

²⁵ This section of third edition *Northern Texas Utilities Co. (Tex. cited in Community Nat. Gas Co. v. Civ. App.)*, 13 S. W. (2d) 184.

it is, in so far as it attempts to amend, extend, or enlarge the franchise contract, void and of no effect. * * * The court holds that the repeal of section 14 of the franchise ordinance was not within the rate-making power conferred on the city commissioners, and could not be repealed without the consent of a majority of the electors of the city voting thereon at an election duly held. * * * To give validity to an invalid, but not unlawful or illegal, contract through the doctrine of estoppel, the asserter must establish that, relying upon conduct and assertions of the other party amounting to a representation that the contract would be performed, he, fully and in good faith, performed his part of the contract to his injury. * * * The findings of fact by the trial court do not bring the appellant within this rule, and the doctrine of estoppel does not apply. * * * The trial court did not find that the rights of the appellant had been prejudicially affected by the delay, and no subject of equitable consideration is presented in favor of the appellant, except the lapse of time. Laches, therefore, does not bar the enforcement of the contract."

Where the franchise provides for an option of the municipality to purchase the plant of the public utility, until such option is exercised, no rights accrue against the utility, which is not required to perform any conditions of the franchise based on the exercise of the option to purchase, for as the court said in the case of *Chicago, Illinois v. Harris Trust & Sav. Bank*, 40 Fed. (2d) 612: "So far as this record shows, there has been no election on the part of the city to purchase, nor any indication on its part of any intention to purchase or to designate a licensee to have such right under the ordinance; and it is not necessary here to determine whether any one has or has not now the right to purchase under the terms of the ordinance. We will, however, consider the provisions of the ordinance under which the special funds in question are to be disposed of in case of a purchase by the city or its licensee. * * * We are of opinion that if it has the right to purchase under the ordinance, it is not now in a position to dictate or complain of the disposition of that fund, as provided for in the decree, because it has not yet elected to do so, nor has it given the notice required by the ordinance. Neither has it designated a licensee who may purchase. * * * We find no provision for the delivery of that fund to the city, and, except as hereinafter considered in connection with the fifty-five per cent of the net income to be paid to the city the city has no right to, or control over, any part of the damage reserve fund.

* * * The ordinance provides that the trust company, qualified to act as a depository under the ordinance and selected by the mayor of the city of Chicago, was to approve, and it did approve, the terms of the mortgage as containing 'no provision unusual or unreasonable in character.' * * * If the funds in question are actually paid to the first mortgagee, they will be far from sufficient to discharge the mortgage, and the mortgagee would necessarily have recourse, in case of purchase, to the purchase-price for the satisfaction of the mortgage. The court could, in the event of purchase, that must necessarily be carried out under the direction of the court, adjust all equities between the parties. If it shall appear that there is any equity in the damage reserve fund belonging to the city, that likewise is a matter that can be adjusted if and when such equity is ascertained."

§ 149. **Presumptions favor municipalities.**—That the more favorable franchise prevails on the theory that all presumptions are in favor of the city is indicated in the case of *Shreveport, Louisiana v. Southwestern Gas & Electric Co.*, 258 Fed. 59, where the court said: "The city provided the terms under which the franchise might be transferred, and thus in advance consented to such transfer under the terms stipulated. It therefore can not be said to be a stranger to the assignment. The assignment could be made only under the conditions provided. Even in the absence of such specific provisions in the franchise, an assignee can acquire no greater rights than his assignor, and he is bound to the city by all of the obligations of the latter. * * * If two franchises, acquired by assignment and operated under by one company, provide different rates, there is no good reason why the company should have the right to demand the higher rate rather than that the city should have the right to demand the lower, and there is certainly no good reason why the city should not demand the rates under the more favorable franchise, when it is so specifically provided in the franchise last acquired by the operating company."

Under the doctrine of implied powers of municipal corporations, the courts have sustained a franchise for the erection and operation of an international bridge extending across the Rio Grande river from the city of Brownsville into the Republic of Mexico. This interesting decision is found in the case of *Malott v. Brownsville* (Tex. Civ. App.), 292 S. W. 606, where the court reasoned as follows: "We believe, in the absence of any express restriction or limitation, there is ample power in the char-

ter of the municipality of Brownsville and in pursuance of its police power to grant this franchise to build and operate the bridge whether it be called an international bridge or otherwise, that may cross the border or not; the city of Brownsville grants only the right in and to its streets. * * * The city exhausts its power when it grants its authority to permit the use and to make 'fit for use * * * the roads to it.' As to the bridge across the Rio Grande and in the Republic of Mexico, it stands as any other bridge similarly situated, spanning that river to Mexico. * * * From the testimony it is shown that the rights that appellant is enjoying will in no sense be interfered with or changed by the building of the bridge and improvement of the streets, nor will his free and undisputed use of his property be interfered with. The appellant has shown no special damage that would justify an injunction to stop the work or cancel the franchise that was approved by the voters of Brownsville. The franchise has been granted by the deliberate and, no doubt, well-considered act of the municipality and approved by the public vote. In the exercise of its police power, as looking to the public interest and benefit of its city and the probable future benefit to result from it, courts will view, when possible, such grants with favor in the absence of any fraud. No city has the power to pass to any person the entire use of one of its public traveled streets in such a way as to destroy its character as a street to the public, and cause it to be closed and appropriated for private use. * * * We have carefully considered the appellant's motion for rehearing, and desire to submit an additional, well-considered authority that a bridge approach placed upon a public street is not an additional servitude upon the street, so as to require compensation to the abutting owner, although access between his property and the street is destroyed. *Barrett v. Union Bridge Co.*, 117 Ore. 220, 243 Pac. 93, annotated in 45 A. L. R. 521, on right of abutting owner to compensation for interference with access by bridge or other structure in public street or highway."

In construing franchise provisions most favorably to the public and in resolving all doubts against the company, the courts held the company liable for the entire expense of paving between its tracks under the provisions of its contract, as is indicated in the case of *Virginia R. & Power Co. v. Norfolk*, 147 Va. 951, 133 S. E. 565, where the court said: "The trial court held that under the franchise of the company and the ordinances of the city, the company was obligated generally to pay only

for the labor expense incurred in the track area in the course of paving the street, and not for the cost of material. It further held that the company was liable for both the materials and labor costs incurred by the city in laying the concrete base for the ties and tracks in the track area under the ordinary paving of the street. Accordingly judgment was rendered for an amount excluding the material used in ordinary paving, but including the other three items above-mentioned. * * * Is the railway company liable, under the terms of section nine of the ordinance above transcribed, to pay for the cost of material, as well as the labor, expended in laying this concrete foundation for its rails and ties? This question, in our opinion, must be answered in the affirmative. * * * In determining the meaning of provisions of this character, it is well settled that they should be construed most favorably for the interests of the public, and against the company enjoying the franchise; and doubts must be resolved in favor of the municipality."

The principle, in the absence of a constitutional limitation, that the state may require a street railway to pave between its tracks or may authorize a municipality to do so, and by special assessment make the cost a lien on the railway's property, is well established and governs the granting of franchises. Where such grants are authorized and made by a municipality, it may require as the condition of such a grant paving between tracks by the company, as is clearly indicated in the case of *Alabama Traction Co. v. Selma Trust & Sav. Bank*, 213 Ala. 269, 104 So. 517, for as the court said: "In line with the principle above stated, it is generally declared that the legislative power of the state may require a street railway to pave or meet the cost of paving its track laid on the grade of a public street; may authorize a municipality to assess the cost thereof to the street railway company, and declare a lien on its property as security for its payment. * * * These authorities hold the right so to do inheres in the police power, the taxing power, or both, unless limited by constitutional provisions. Many of them revert to provisions similar to our section 238, Constitution of 1901. Manifestly this section does not take away the general guaranties of the constitution for the protection of property rights of all citizens, natural or artificial. * * * No corporation or person can operate a public utility over the streets of a city without its consent. This is guarantied by the constitution. * * * The privilege of laying permanent tracks upon the street and operating thereon the business of a common carrier

of passengers for hire is a valuable franchise. It is a public franchise as distinguished from the franchise of a private corporation—the mere right to exist and do business as a body corporate. The power to tax such franchise or privilege is not questionable; neither is the power to fix the conditions upon which such grants shall be enjoyed. Such tax is a franchise or privilege tax. * * * We do not concur in the view that the assessment here involved is a denial of the equal protection of the laws. The statute applies to all alike who enjoy the franchise for operating a street railway. * * * We are referred to no case declaring a want of power to impose upon the street railway the full cost of paving its tracks in keeping with adjacent parts of the street. General authorities * * * have declared such assessment just and proper. We concur in this view.”

Where the franchise requires the street railway system to pave its track zone with the same material with which the balance of the street is paved, although certain streets were not paved at the time the franchise was granted, the court held the company liable to pave between its tracks when the balance of the street is paved by the municipality. This decision is based on the fact that the franchise provides for paving and on the rule of interpretation whereby such grants are construed in favor of the public where there is any ambiguity in the terms of the franchise. The court said in the case of *City Electric Co. v. Albuquerque*, 32 N. Mex. 397, 258 Pac. 573: “A fair interpretation of the franchise above set out would seem to require, in terms, the paving of the track zone by the plaintiff with the same material used by the city on the rest of the streets. At the time of granting of this franchise, the streets of Albuquerque were not paved. The parties must have contemplated at that time that the streets would be paved in the future, else the use of the word ‘pave’ would be superfluous. When the streets should be paved by the city, it was clearly contemplated that the plaintiff should be required to pave the track zone. This is the only conclusion which can be drawn from the franchises. * * * The interpretation which we place on the franchises is strengthened by the recognized consideration that in case of ambiguity, if there were any, in the franchises they are to be interpreted most strongly in favor of the public and against the grantee. 2 Elliott, Roads and Streets (4th ed.), section 941.1.”

This same court, in holding the street railway liable for the cost of paving between its tracks, also upheld the validity of a

statute making such cost a lien upon the property of the company for such paving, which lien the court also permitted to have priority over a trust deed securing bonds which the company had issued prior to the laying of the pavement and to the passing of the statute creating the lien, thus giving it priority in favor of the city even as against a prior valid mortgage upon the property, because this was done in the exercise of the taxing power of the municipality, under which the court held priority was permissible, in the case of *Albuquerque v. City Electric Co.*, 32 N. Mex. 401, 258 Pac. 574: "In these cases we have held that the present defendant is liable on contract for the cost of paving its track zone in the city of Albuquerque, and that there is no objection to chapter 152, Laws 1919, in so far as it has authorized the fixing of the lien upon the property of the defendant for the cost of such paving. In these cases, however, there was no discussion of the question of the relative priority of the paving lien over prior encumbrances. It appears in this case that the defendant had executed a trust deed securing bonds in the sum of approximately \$200,000 upon its property long prior to the institution of the paving program above referred to. At that time there was no statute giving to the paving lien any priority over prior encumbrances. By section 3, c. 152, Laws 1919, however, the legislature provided that the paving lien should 'constitute a lien thereon, superior to any other lien or claim, except state, county and municipal taxes.' The question, then, is as to whether it is competent for the legislature to create a priority in favor of the city as against a prior valid mortgage upon the property of the street railway company. In approaching the question, certain established principles of taxation are to be observed. In the first place, the power to levy a special or local assessment is essentially a branch of the taxing power. 1 Page & Jones, *Taxation by Assessment*, section 8; 2 Cooley, *Taxation* (3d ed.), p. 1153 et seq. This being so, it is competent for the legislature to provide that such taxation shall be a lien upon property paramount to prior liens by way of contract, mortgages, judgments, etc. * * * This proposition would seem to be thoroughly established by the authorities. It must be so because taxes are laid upon the res in the exercise of a high sovereign power, and all persons having an interest in the res must yield obedience to that power. The fact that the law creating the priority of the tax was enacted after the mortgage was executed seems to be immaterial. The owner of the property and the mortgage alike are at all times

subject to the taxing power of the state. * * * It is only in states where retroactive statutes are forbidden that such laws are unconstitutional, as in *Texas, Mellinger v. Houston*, 68 Tex. 37, 3 S. W. 249. * * * Under these circumstances, no question of benefits, discrimination, or confiscation can arise. If defendant has contracted to pay the cost of the paving, it must do so, regardless of the consequences to it. The contract stands in the way of defendant to raise any question in regard to the amount of the tax."

Although there was no express provision in the franchise requiring a street railway to pave between its tracks, the court held it liable to pay for the cost of such pavement, which had been laid by the municipality, because this was a power inherent in the municipality and within its reasonable regulations, for as the court said in *Walworth v. Chicago, Howard & Geneva Lake R. Co.*, 190 Wis. 379, 208 N. W. 877: "The right of municipalities to require corporations whose railway tracks are placed in public streets to keep the track zone in proper repair so that the public may safely travel over the same is an inherent power not dependent on the provisions of any charter or statute. It is obligatory on the defendant company to comply with all reasonable regulations of the plaintiff village "in respect to paving and repaving of the streets and keeping them in a proper state of repair within the railway zone, without any condition in the charter in that regard." * * * No question is raised, but that the railway zone was so badly out of repair as to seriously interfere with and endanger public travel. Under the police power, as well as under the power granted by section 193.01 of the Statutes, the plaintiff had the power to make such reasonable regulations by ordinance as may be necessary to protect the public and to secure to the public its right to use the railway zone for travel without danger to the public. The only questions that remain are whether the Ordinance 44 is a reasonable regulation to accomplish such purpose and whether the failure to let the contract for paving the railway zone as required by statute will relieve the defendant from liability to pay for the improvement of the railway zone. The action is not one to enforce a tax or a special assessment against the property of the defendant. It is an action to recover the money which the plaintiff has expended to secure the performance of a duty imposed upon the defendant. This work was done pursuant to stipulation of the parties. The sole question at issue is the reasonable value of

the work performed which it was the duty of the defendant to perform.' ”

While recognizing the rule that municipal franchises should be construed strictly against the grantee, a provision for paving between its tracks so long as the street railway system used animal power was held not to require the continued paving after the abandonment of animal power, where the contract provided that, following the abandonment of such power, the company should be liable only for the expense of paving due to the presence of its tracks in the streets. In holding that the municipality could not continue to require the street railway to bear the entire cost of paving between its tracks after discontinuing the use of animal motive power because this would constitute a clear violation of the fair meaning of the terms of the franchise, the court said in the case of *Duluth v. Duluth St. R. Co.*, 172 Minn. 187, 215 N. W. 69, that: “The construction contended for by the city would thwart the plain intent of defendant’s franchise, that while it continued the use of animal power it should bear the whole cost of intertrack paving, but after its abandonment it should stand only the extra expense due to the presence of its tracks. * * * In similar fashion, this opinion must be confined in effect to the precise and only point decided. It is that defendant’s duty to keep paving in repair does not obligate it to repave in the face of the provision of its franchise imposing on it the duty to pay, in the case either of paving or repaving, ‘only so much of the expense * * * as is made extra by reason’ of its railway. It is true that franchises are to be construed strictly against the grantees, and that provisions exempting from the cost of paving ‘are not lightly to be read into a contract between a state and a public utility.’ *Ft. Smith Light and Traction Co. v. Board of Improvement of Ft. Smith*, 47 Sup. Ct. 595, 71 L. ed. 1112. In *pari passu* are clear provisions limiting the obligation of the utility. They are not lightly to be read out. That, we think, has been attempted here. No rule of construction, however strict, permits resort to construction merely to create ambiguity and conflict and thereby justify further construction in their removal.”

Contrary to what seems to be the general rule, requiring paving between its tracks, the court of Georgia, under a somewhat strict construction, exempting the company from liability for paving unpaved streets, also exempted the company from the duty of repaving a street under the theory that it was “new paving,” although it required the company to bear the cost of

preparing its road bed for such "new paving," in the case of *Macon v. Georgia Power Co.*, 171 Ga. 40, 155 S. E. 34: "It is conceded by the plaintiff in error that under the statute and ordinances the company has secured exemption from liability for costs of new street paving if placed on streets yet to be opened and on streets not yet paved. * * * To sum up, we hold that the 'repaving' of a portion of Vineville avenue, replacing brick with concrete, is 'new paving' and 'street paving,' in contemplation of the city ordinance; and that the company is not liable therefor, but is charged with the duty of preparing its roadbed for the reception of 'new paving.' * * * Paving assessments, it has been repeatedly held, are not taxes or taxation. It is therefore within the legislative power to authorize exemptions from such assessments. * * * The exemption clearly appearing, and the contract being valid, the city of Macon was proceeding illegally to enforce collection of assessment for repavement of Vineville avenue against the Georgia Power Company. This being true, the trial judge did not err in granting the injunction."

While all presumptions in the construction of municipal franchises prevail in favor of the municipality, only a just and reasonable construction will be given them; and where the franchise provides for the maintenance and operation of a plant for the manufacture and distribution of artificial gas, the court permitted the company to furnish natural gas, instead, because it held this to be a reasonable construction and for the best interest of the inhabitants of a municipality, in the case of *Laurel v. Mississippi Gas Co.*, 49 Fed. (2d) 219, where the court said: "This is an appeal from a decree granting a temporary injunction against the city of Laurel to restrain it from interfering with the distribution of natural gas by appellee, the Mississippi Gas Company. * * * Of course, a public franchise is to be construed in favor of the public, but nevertheless it must be given a just and reasonable construction. *Russell v. Sebastian*, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, Ann. Cas. 1914A, 152. It is contended by the city that the provisions of the franchise for the erection and maintenance of a plant for the manufacture of artificial gas require a construction that the company was restricted to the distribution of that kind of gas and exclude any right to distribute natural gas. Such construction would not be in favor of the people of Laurel. The main object to be achieved was the supplying of gas for heating and lighting. It may well be that natural gas is both better and cheaper. It is

merely incidental to the furnishing of gas that it be first manufactured. If nature performs that function, it would be a reasonable construction of the franchise that the right to furnish gas to the city of Laurel includes the furnishing of natural gas. If that is done, the right to generate the gas then becomes incidental and immaterial. It is contended by the gas company that the natural gas to be supplied would have greater value in heat units and at the same price would be to the advantage of the consumer. Whether this is true is immaterial. The city of Laurel has the right to prescribe just and reasonable rates for gas, provided they do not impair the obligation of any valid existing contract. Section 2426, Mississippi Code of 1930. No doubt this authority is ample to protect the city and its citizens against unfair rates."

§ 150. **Nonuser.**—That the franchise rights may be lost by nonuser just as they never become vested by a failure to comply with the conditions of their grant is well stated in the case of *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 59 L. ed. 184, 35 Sup. Ct. 72: "But, while the grant becomes effective when made and accepted in accordance with the statute, and the grantee is thus protected in starting the enterprise, it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent, or that the grantee is duly proceeding to perform. And when it is said that there is vested an indefeasible interest, easement, or contract right, it is plainly meant to refer to a franchise not only granted, but exercised in conformity with the grant. (See cases cited, *supra*.) It is a tacit condition annexed to grants of franchises that they may be lost by misuser or nonuser. *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. ed. 650, 653; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 580, 28 L. ed. 1084, 1087, 5 Sup. Ct. 681; *Given v. Wright*, 117 U. S. 648, 656, 29 L. ed. 1021, 1024, 6 Sup. Ct. 907. The condition thus implied is, of course, a condition subsequent. The same principle is applicable when a municipality under legislative authority gives the permission which brings the franchise into being; there is necessarily implied the condition of user. The conception of the permission as giving rise to a right of property in no way involves the notion that the exercise of the franchise may be held

in abeyance for an indefinite time, and that the right may thus be treated as a permanent lien upon the public streets, to be enforced for the advantage of the owner at any time, however distant. Although the franchise is property, 'it is subject to defeasance or forfeiture by failure to exercise it (*People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961), or by subsequent abandonment after it has been exercised (*People v. Albany & V. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295).' If 'no time is prescribed, the franchise must be exercised within a reasonable time.' *New York v. Bryan*, 196 N. Y. 158, 164, 89 N. E. 467. It follows that where the franchise has not been exercised within a reasonable time in accordance with the condition which inheres in the nature of the grant, its revocation upon this ground can not be regarded as an impairment of contractual obligation. The privileges conferred may be withdrawn by such methods of procedure as are consistent with established legal principles."

§ 151. **Constitutional limitations.**—By constitutional provisions the municipalities of Texas may not bind themselves by contract and impair their right to regulate rates of public utilities as appears from the case of *Houston, Texas v. Southwestern Bell Tel. Co.*, 259 U. S. 318, 66 L. ed. 961, 42 Sup. Ct. 486, P. U. R. 1922D, 793: "The Constitution of Texas, adopted in 1876, § 17, art. 1, provides: 'No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof.' It has been definitely decided that, while municipal corporations in Texas, as agencies of the state, may have the power to prescribe rates for public service corporations, this provision of the constitution prohibits their making contracts for the future which may not be modified at any time by appropriate action of the municipality. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. ed. 492, 26 Sup. Ct. 261; *San Antonio v. San Antonio Pub. Service Co.*, 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. 428, and *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. 400. * * * We think that neither party was bound by the ordinance and the acceptance of it, that the district court fell into error, and that the proper base for rate-making in the case is the fair value of the property, useful and used by the company, at the time of the inquiry."

While recognizing the power of a municipality to fix rates for service by contract or in the franchise, which would be binding upon the parties for the time being, the court indicates that

under the constitutional provisions of Virginia, the ultimate power to regulate rates rests in the state, and that it may exercise it at any time, so that municipal regulations on this subject continue only until action is taken by the state in the exercise of its police power. This principle is established as follows in the case of *Richmond v. Virginia R. & Power Co.*, 141 Va. 69, 126 S. E. 353, where the court said: "In disposing of the question as to the alleged contracts entered into between the parties litigant since the adoption of the present Constitution in 1902, we are of the opinion that, though valid between the contractor and contractee, they are subject to section 156 (b) of the Constitution, which vests the state corporation commission with plenary power to regulate and prescribe just and reasonable rates to be charged by a public service corporation. * * * Since the adoption of the constitution, and during the existence of the contracts relied on, appropriate statutes have been enacted carrying into full effect and operation the plenary powers vested in the commission by the constitution. * * * Therefore we conclude that unless restrained by the constitution the state has the right to delegate to municipalities the right to fix rates which are binding between the parties, but that, where the authority to make such contracts is given, the contract will be held inviolable and free from interference by either party, only until the state elects to exercise for the public weal its inherent attribute known as the police power. In no state of the Union has the police power been more zealously guarded than in this commonwealth."

§ 152. **Franchises strictly construed.**—That franchises are strictly construed in favor of the city granting them and no exemptions will be found by implication is decided by the United States Supreme Court in the case of *Durham Public Service Co. v. Durham*, North Carolina, 261 U. S. 149, 67 L. ed. 580, 43 Sup. Ct. 290: "The court below held that while this contract imposes no liability for paving, neither does it grant exemption therefrom. And we agree with their conclusion. Such exemptions must plainly appear. The general rule is that doubts as to provisions in respect of them must be resolved in favor of the municipality or state. *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 130, 51 L. ed. 399, 405, 27 Sup. Ct. 202. * * * The power of the legislature to make reasonable classifications and to impose a different burden upon the several classes can not be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks.

The facts and circumstances disclosed by the present record are not sufficient to justify us in overruling the judgment of the state court, which held that the assessment was not the result of arbitrary or wholly unreasonable legislative action."

This same court under the doctrine of strict construction of franchise rights refused to permit a street railway company to abandon a part of its service because it was unprofitable and for the further reason that, in order to continue it, a substantial expenditure was necessary in relaying its tracks, which, however, it expressly agreed to do under the terms of its franchise. In holding that the company must continue to operate its entire system so long as it enjoyed the terms of the franchise, although indicating that it might abandon its franchise altogether, this court said in the case of *Fort Smith Light & Traction Co. v. Bourland*, 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249:²⁶ "Under the law of Arkansas, a street railway is not permitted to abandon any part of its line without leave of the city commission, which exercises the powers of a public utility commission. The company applied to that board for leave to abandon the line on Greenwood avenue because it was, and would be, unremunerative. It appeared, among other things, that the city had concluded to change the grade of Greenwood avenue; that, in accepting its franchise, the company had agreed to conform to the city ordinances; that these required a street railway, in case of any change in the grade of a street, to make the grade of the tracks conform thereto; that the cost of so relaying the tracks on Greenwood avenue was estimated at \$11,000; that the allocated daily earnings of this small part of the system were \$2.40, the cost of operating it \$8.25; and that the total net earnings of the system in 1922 were \$16,000, which amount is about 1.7 per cent of \$934,540, the estimated value of the property. The request to abandon the Greenwood avenue line was denied. This suit was then brought in a court of the state to set aside the order, on the ground, among others, that it deprived the company of its property in violation of the due process clause of the Fourteenth Amendment. The trial court denied the relief sought. Its judgment was affirmed by the highest court of the state. 160 Ark. 1, 254 S. W. 481. The case is here on writ of error, under section 237 of the Judicial Code. The Greenwood avenue line had been in operation nearly twenty years. No

²⁶ Rehearing denied and opinion amended in 268 U. S. 676, 69 L. ed. 631, 45 Sup. Ct. 511.

change in conditions had supervened which required the commission to permit the abandonment, unless it were the fact that this particular part of the system was being operated at a loss; that continued operation would involve practical rebuilding of that part of the line; that such rebuilding would entail a large expenditure; and that the system, as a whole, was not earning a fair return upon the value of the property used and useful in the business. The order complained of does not deal with rates. Nor does it involve the question of the reasonableness of service over a particular line. * * * The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. 330; *Chesapeake & O. R. Co. v. Public Serv. Commission*, 242 U. S. 603, 607, 61 L. ed. 520, 522, 37 Sup. Ct. 234. Compare *Railroad Commission v. Eastern Texas R. Co.*, 264 U. S. 79, 85, 68 L. ed. 569, 572, 44 Sup. Ct. 247. This is true even where the system as a whole fails to earn a fair return upon the value of the property. So far as appears, this company is at liberty to surrender its franchise and discontinue operations throughout the city. It can not, in the absence of contract, be compelled to continue to operate its system at a loss. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323, P. U. R. 1920C, 579, 40 Sup. Ct. 183. But the constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit, and escape from the burdens incident to its use."

Under the doctrine of the strict construction of franchises in favor of the city granting them, the court will not permit a consolidated company which has furnished street railway and power service as a single system to discontinue either line of service, which may prove unprofitable, for as the court said in the case of *Broad River Power Co. v. State of South Carolina*, 281 U. S. 537, 74 L. ed. 1023, 50 Sup. Ct. 401, P. U. R. 1930C, 234: "From the organization of the Consolidated Company until 1925, both the street railway and power business of the Consolidated Company were expanded as a single business, its capital stock was increased from time to time, and the system of accounts was such that it did not disclose whether its power system was constructed more from the proceeds of its street railway or its power business. * * * The Supreme Court

of South Carolina, in referring to this corporate history and the effect of the Consolidation Act, said: "When the new company, in compliance with this act, effected the consolidation and in pursuance of the provisions of the act built, constructed and operated its "electric railway, light and power properties as parts of one business for nearly forty years," these rights, powers and privileges became inseparably bound together and can not be separated. As contended by the petitioners (respondents here), "such diversity as there was in the conditions of the former franchise became obliterated and extinguished by the major purpose of the new act,—namely, the consolidation of all the powers into one company for the greater benefit of the public." In the light of the familiar rule that franchises are to be strictly construed, and that construction adopted which works the least harm to the public (see *Blair v. Chicago*, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. 427; *Northwestern Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. ed. 1036, 1038; *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. 475), we can not say that this interpretation of statutes of the state of South Carolina, by its highest court, so departs from established principles as to be without substantial basis, or presents any ground for the protection, under the constitution, of rights or immunities which the state court has found to be nonexistent. It follows that it was within the constitutional power of the state to refuse to permit any partial abandonment of the consolidated franchise. * * * The order compelling petitioners to serve does not involve a determination whether or not the rate is confiscatory, nor does it foreclose a consideration of that question upon appropriate proceedings. * * * Nowhere in this legislation is there any affirmative disclosure of a purpose to relieve any of the corporations of existing duties and obligations or to enlarge their privileges. * * * In any case, the limitation in this section that the company acquiring any franchise shall take it subject to existing restrictions, requirements and conditions may, we think, reasonably be deemed to preclude the possibility of relieving from franchise duties and obligations when no such purpose is disclosed in the body of the legislative act."

Under the doctrine of the strict construction of franchise rights in the interest of the public, the term "streets" is held to include bridges as an integral part of streets, and requires the utility to maintain and repair bridges as well as streets, as is indicated in the case of *Roanoke R. & Electric Co. v. Brown*, 155 Va. 259, 154 S. E. 526, for as the court said: "The rule [is] that in

construing such ordinances the ordinance is to be construed most strongly against the company and in favor of the public.

* * * The language and provisions of the ordinance of 1892 does not either in clear and explicit terms or by necessary inference exclude from the streets which the electric company is thereby required to maintain and keep in repair those portions thereof carried on bridges which form an integral part of a street, as does the bridge here in question. * * * If 'streets' as used in the ordinance of 1892 includes bridges which are integral parts of the streets, as we think it does, then, upon the construction of this bridge, the Virginian and the electric company owed to the city independent, but concurrent, duties to maintain and keep it in repair, the Virginian to the extent of maintaining and repairing the whole bridge, the electric company to the limited extent provided in the ordinance granting it authority to lay its tracks in the streets. * * * A proper construction of the ordinance of 1892 imposed upon the electric company the duty to keep in good condition the flooring of this bridge between its rails or tracks and for one foot on each side thereof."

As franchises are strictly construed in favor of the municipality granting them, a municipal public utility may be required to meet the cost of changing its tracks and of paving between and alongside them so that they will conform to the changed grade of the street, as is indicated in the case of *Ohio Traction Co. v. Huwe* (Ohio), 181 N. E. 114, where the court said: "The cost of changing the tracks to conform to the grade established and the cost of paving the same between the rails and for eighteen inches outside thereof is a proper item of assessment under the terms of the franchise. We will, therefore, strike from the fourth defense of the amended answer, and eliminate therefrom, all allegations with reference to the cost of furnishing new rails and ties and foundation for the tracks, and with these allegations eliminated from the answer the demurrer will be overruled, and an issue may be made as to the amount strictly chargeable to the cost of conformation of the tracks to the change of grade and the paving between the tracks and for eighteen inches outside thereof."

Although the state reserves the power to fix and enforce reasonable rates, this does not give it the right to fix rates that are confiscatory; and on the other hand, where the municipality has the authority from the state to fix rates by contract with the public utility, these rates will not be disturbed by the court,

although they may be or become confiscatory, even for the benefit of security holders who are payable from the earnings of the company for which the municipality had the power to fix rates sufficient to pay the holders of the securities of the public utility, whether the rate does so or not, provided only that the rate was fixed by agreement of the parties, including the security holders. In holding that while the municipality might raise the rate sufficiently to pay the securities, it is not obliged to do so, nor will the court require a receiver operating the plant to raise the rates for this purpose, the court said in the case of *Karel v. Eldorado*, Illinois, 32 Fed. (2d) 795: "If the legislative authority to fix and enforce reasonable rates to be paid public utility corporations for the services performed by the latter be reserved, that power does not include the right to fix rates so low as to be confiscatory of the property of the utility companies. *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 541, at page 542, 41 Sup. Ct. 400, 65 L. ed. 764, and cases there cited. It is equally well settled, however, that if the public service corporations and the legislative agency dealing with them have power to contract as to rates, and carry that power into effect by agreeing upon the same, the enforcement thereof is controlled by the terms of the contract, and in such case the question as to whether such rates are confiscatory is immaterial and irrelevant. *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 541, 41 Sup. Ct. 400, 65 L. ed. 764. * * * It becomes necessary, therefore, to determine whether the city of Eldorado had power to enter into a valid contract with security holders fixing rates, and whether it did enter into such an agreement. If there is a binding contract as to rates, the court has no jurisdiction to inquire into any alleged confiscatory character of the same. * * * By this act the legislature conferred upon the city the right to buy a water plant, to issue certificates for the payment therefor, to execute a mortgage securing same, and to fix water rates to produce funds, by an ordinance to be agreed to by the persons receiving the certificates. The legislature reserved no authority over rates, and included no direction to the city council as to the exercise of its discretion in fixing and agreeing upon rates for private use. The statute amounts to a grant of a legislative power to fix rates and contract therefor. It is quite well recognized that a city, acting under state authority, may, in matters involving ownership or proprietorship of utilities, make binding agreements with those with whom it deals. *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 27

Sup. Ct. 762, 51 L. ed. 1155; Columbus Ry. Power & Light Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. ed. 669, 6 A. L. R. 1648. * * * Among the numerous covenants and agreements therein contained is one by the city, identical with that contained in the ordinance, to the effect that water supplied to consumers shall be supplied through meters only, and 'that the rates to be charged therefor shall be as fixed in and by the ordinance aforesaid, and that said rates shall not be reduced until all of the said special water fund certificates of indebtedness and the interest thereon shall have been fully paid.' This mortgage was executed by the city, and the trustee accepted the same and became bound thereby. These documents evidence the purchase of the water plant and the payment therefor. The plaintiff is the representative of the persons to whom said certificates were issued for the plant. These facts cogently establish that the parties entered into a binding contract as to rates to be charged private consumers. * * * Authority to execute the contract having been granted by the legislature, and the city having exercised that authority by its ordinance fixing rates, to which the security holders, by their representative, assented, no reason appears why each of the respective parties should not be bound by the formal agreement. * * * In the instant case the security holders received the securities, which the city contracted should be paid out of a special fund produced by certain schedules, which should not be reduced. Plaintiff now says that, because its interest is not being paid, the rates so fixed in its contract are confiscatory, and that the fact that the city may possibly raise the rates nullifies any binding effect of contractual relationship. This court is unable to conceive of any reason why, even though there is an option reserved to the city to do something that might benefit the security holders—that is, to raise the rates—it follows that there is lack of mutuality or that there is no binding contract. The security holders agreed to accept certain fixed rates; the city agreed to see that they were assessed and paid. Both parties are bound. * * * This court will not hesitate to direct the receiver so to operate and manage the property as to produce sufficient revenue to pay the expenses of administration, but it has no jurisdiction to direct a receiver, merely because he is a receiver of this court, and for no other reason, to collect funds sufficient to pay interest upon the securities, payable according to the terms of a binding contract. If the plaintiff is entitled to such relief, it must be upon grounds other than that a receivership is pending which is oper-

ating the property for the court, upon ground of its own making, and not because of the court's action in taking over the property and preserving it for the benefit of all parties."

Where the franchise maximum rate was definitely fixed under sufficient statutory authority granted to the municipality to make the contract, the Supreme Court of the United States refused to disturb the contract rate, unless it was changed by the parties to the contract or the state, especially where the Supreme Court of the state had sustained it, for as the court said in the case of *Southern Utilities Co. v. Palatka*, Florida, 268 U. S. 232, 69 L. ed. 930, 45 Sup. Ct. 488: "It alleged a contract in the grant of the petitioner's franchise by which the petitioner was bound not to charge more than that sum. The defendant pleaded that, in present circumstances, the rate prescribed in the ordinance granting the franchise was unreasonably low, and that to enforce it would deprive defendant of its property without due process of law, contrary to the Constitution of the United States. The plea was overruled, and defendant having declined to plead further, a decree was entered for the plaintiff by the circuit court for Putnam county, which subsequently was affirmed by the Supreme Court of the state. 86 Fla. 583, 99 So. 236. The Supreme Court held that the city had power to grant the franchise and to make the contract, and that it had no power, of its own motion, to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality, and therefore that it is free, and can not be held to rates that, in the absence of contract, it would be unconstitutional to impose. The argument can not prevail. Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613; *Opelika v. Opelika Sewer Co.*, 265 U. S. 215, 218, 68 L. ed. 985, 987, 44 Sup. Ct. 517."

CHAPTER 8

NO EXCLUSIVE FRANCHISE UNDER IMPLIED POWER

Section	Section
155. All power of municipality derived from state.	163. Strict construction of statutory authority excludes implication.
156. No implied power in municipality to grant exclusive franchises.	164. Conditional grants of exclusive franchises construed strictly.
157. Franchises not exclusive to avoid monopolies.	165. Municipality an agent of the state.
158. Duration of franchise.	166. Constitutional provision limits grant by state.
159. Control of competition.	167. Municipal control of streets impaired by exclusive franchises.
160. Competitor not excluded by unauthorized exclusive franchises.	168. Exclusive franchise prevents municipal control.
161. Power to grant franchises strictly construed.	169. Exclusive franchise held unnecessary.
162. Monopolies held contrary to public interest.	170. Limitation.

§ 155. All power of municipality derived from state.—Unless clearly authorized to do so by the state in connection with the power conferred by it upon municipal corporations to grant special privileges in the nature of franchise rights to municipal public utilities, municipal corporations are not authorized to make their grants of such rights or special privileges exclusive. As before stated, the state has exclusive control over its highways, including the streets of municipal corporations, and this control remains exclusively in the state except in so far as it may be delegated to the municipality, which accordingly has only so much power to control the streets and grant special privileges for their use as has been clearly conferred upon it by legislative authority. The local consent of the particular municipality where the public utility seeks to operate in addition to that of the state is frequently required as a condition precedent to such operation.

§ 156. No implied power in municipality to grant exclusive franchises.—When the development of municipal public utilities was undertaken in this country it was believed that competition would secure to the public efficient service at reasonable rates

from the private corporations which were intrusted with their operation. The courts accordingly from the beginning attempted to formulate the law in such a way that monopolies might not develop and that competition might be maintained for the purpose of providing the necessary regulation and control. This was the first reason and has remained the controlling purpose of the courts in holding that municipal corporations, in the absence of statutory authorization, may not grant exclusive franchises for the ownership and operation of municipal public utilities.

§ 157. **Franchises not exclusive to avoid monopolies.**—As already indicated, many of our courts have been inclined to recognize that municipal corporations have the power necessary to permit them to own and operate municipal public utilities or to lease their public utilities to private concerns, and thus regulate the service rendered and retain control for the benefit and advantage of themselves as well as that of their citizens. This is the position which many courts have taken, not only for the purpose of preventing monopolies, but to avoid the disadvantages incident to the exercise of exclusive rights by private corporations which the courts recognize are naturally actuated primarily by the motive of gain rather than public service. This same purpose of maintaining competitive conditions by excluding monopoly features and prohibiting the granting of exclusive privileges except on clear authority has actuated the courts when they have been called upon to determine the legal relations which should exist between municipalities and private corporations in those cases where it has been found necessary or advisable to adopt the policy of private ownership and operation.

§ 158. **Duration of franchise.**—Where, as in most cases the policy of the municipal ownership of plants supplying these public utilities fails or is not available or desirable, it becomes necessary to depend upon private initiative for the service, the erection and maintenance of such systems require so large an investment that private capital will not undertake such enterprises under franchises running for unreasonably short periods of time. This situation has been greatly modified and all questions as to the duration of the franchise completely changed by the introduction of the indeterminate permit which is now commonly supplanting the former franchise rights which were granted for an arbitrary fixed period. Under this new practice the state grants the public utility permission to maintain and operate its system

for an indeterminate period—practically indefinitely—so long as proper service is given at reasonable rates under the control and regulation of state commissions.

§ 159. **Control of competition.**—It became necessary therefore to grant rather long-term franchises before private capital would consent to launch such a business which requires a large and long-time investment, because, as will be shown later, the property so used can not be easily turned or converted into cash unless the statute expressly permits of its sale and transfer to another, or unless the municipality itself be the purchaser. To the extent that it is necessary to arrange for the providing of such service by private capital, there is necessarily a loss of the control in the municipality that goes with ownership. Notwithstanding, where it is found necessary to depend on private interests for these services, the courts concede to municipal corporations the power by implication to grant the necessary franchises for the supply of such public utilities for a limited period; but in doing so, they have held strictly that such power does not include the granting of exclusive privileges for rendering such service. By means of this reservation greater control is saved to the municipality since possible future competition remains available as a means of regulating the supply from private sources. But experience has shown that this method of control is often inadequate and unsatisfactory for the reason that providing the service of these public utilities is concerned with the supplying of natural monopolies, for which, as will be more fully discussed later, competition can not provide the necessary regulation and control.¹

¹ *United States. Freeport Water Co. v. Freeport, Illinois*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 493; *Joplin, Missouri v. Southwest Missouri Light Co.*, 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. 43; *Mitchell, South Dakota v. Dakota Central Tel. Co.*, 246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. 362.

Federal. New Orleans City R. Co. v. Crescent City R. Co., 12 Fed. 308; *Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co.*, 24 Fed. 306; *Grand Rapids Elec. Light &c. Co. v. Grand Rapids, Edison Elec. Light &c. Co.*, 33 Fed. 659; *National Foundry &c. Co. v. Oconto Water Co.*, 52 Fed. 29; *Westerly Waterworks v. Westerly, Rhode*

Island, 75 Fed. 181; *Logansport R. Co. v. Logansport, Indiana*, 114 Fed. 688, appeal dis. in 192 U. S. 604, 48 L. ed. 584, 24 Sup. Ct. 851; *Water, Light &c. Co. v. Hutchinson, Kansas*, 144 Fed. 256, affd. in 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. 135; *Los Angeles Gas &c. Co. v. Los Angeles, California*, 241 Fed. 912, P. U. R. 1917F, 833, affd. in *Los Angeles, California v. Los Angeles Gas &c. Corp.*, 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76.

Alabama. Birmingham &c. Mines St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; *Montgomery Light &c. Co. v. Citizens Light, Heat &c. Co.*, 142 Ala. 462, 38 So. 1026; *Gadsden v. Mitchell*,

§ 160. **Competitor not excluded by unauthorized exclusive franchises.**—A discussion of some of the leading cases on this general question will serve to make these statements more authoritative and will illustrate more fully the force and practical effect of the principles herein enunciated. The general principle is clearly expressed in the case of Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142, decided in 1900, in which the complainant claimed the exclusive right to use the streets of the defendant city for operating an electric light plant by virtue of a franchise granted by such city and made in terms exclusive. In refusing relief in the action which was to enjoin the erection of a competitive electric light system in said city the court spoke in the following manner: "Surely, we can not say, contrary to the drift of all the law of the country, that the mere power to control streets and light the same carries with it by implication the enormous power to

145 Ala. 137, 40 So. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. 20.

California. *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61; *Sacramento v. Pacific Gas & Co.*, 173 Cal. 787, 161 Pac. 978; *St. Helena v. Ewer*, 26 Cal. App. 191, 146 Pac. 191.

Colorado. *People v. Loveland*, 76 Colo. 188, 230 Pac. 399.

Connecticut. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

Florida. *Florida Cent. & C. R. Co. v. Ocala St. & C. R. Co.*, 39 Fla. 306, 22 So. 692; *Capital City Light & Co. v. Tallahassee*, 42 Fla. 462, 28 So. 810, *affd.* in 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. 866.

Illinois. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329.

Indiana. *Citizens Gas & C. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647.

Iowa. *Logan v. Pyne*, 43 Iowa 524, 22 Am. Rep. 261.

Louisiana. *Canal & C. St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 6 So. 849; *New Orleans City & C. R. Co. v. New Orleans*, 44 La. Ann. 728, 11 So. 78.

Michigan. *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Detroit*

Citizens St. R. Co. v. Detroit, 110 Mich. 384, 68 N. W. 204, 35 L. R. A. 859, 64 Am. St. 350, *affd.* in 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. 732.

Minnesota. *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. 547.

Missouri. *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761.

Nebraska. *May v. Gothenburg*, 88 Nebr. 772, 130 N. W. 566; *Marquis v. Polk County Tel. Co.*, 100 Nebr. 140, 158 N. W. 927.

New York. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546, *affd.* in 154 U. S. 519, 38 L. ed. 1077, 14 Sup. Ct. 1153; *Potter v. Collis*, 156 N. Y. 16, 50 N. E. 413; *Parfitt v. Ferguson*, 159 N. Y. 111, 53 N. E. 707.

North Carolina. *Thrift v. Elizabeth City*, 122 N. Car. 31, 30 S. E. 349, 44 L. R. A. 427.

Oregon. *Parkhurst v. Salem*, 23 Ore. 371, 32 Pac. 304.

Rhode Island. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

West Virginia. *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Clarksburg Elec. Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

tie the hands of an important municipality for many years, or that such a power is indispensable or necessary to enable the municipality to carry out its legitimate functions. Therefore, the council of Clarksburg had no authority to grant this exclusive franchise; and that feature of its ordinance is *ultra vires*, and therefore void, confers no right [and] makes no contract."

§ 161. **Power to grant franchises strictly construed.**—In the case of *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526, decided in 1896, the court, in construing a statute empowering any city or town to grant to persons or corporations the right to erect waterworks therein to supply its inhabitants with water, said: "It will be seen at once that, in attempting to grant to said company the exclusive right to lay water pipes in the public highways of the said town, the town council exceeded the authority conferred by said statute, and hence that the town is not bound by said contract; for, however, it may be as respects the power of the legislature to make such a grant exclusive, it is clear that no such power can be exercised by a town council unless it is conferred by express words or by necessary implication."

Unless clearly authorized to grant exclusive franchises a declaration of the city that a franchise ordinance is not exclusive is without effect, for as the court said in *St. Helena v. Ewer*, 26 Cal. App. 191, 146 Pac. 191: "The declaration that the franchise should not be regarded as exclusive did no more than to announce what would have been true without it, for the constitution gives to every person the right to use the public streets of a municipality for the purposes indicated, and, as the cases cited hold, it deprives not only the municipality from granting but the legislature from authorizing the granting of franchises upon conditions other than those specified in the constitution."

§ 162. **Monopolies held contrary to public interest.**—The law on this question is shown to be fundamental and of long standing in the opinion of the court of North Carolina, in the case of *Thrift v. Elizabeth City*, 122 N. Car. 31, 30 S. E. 349, 44 L. R. A. 427. In construing a municipal ordinance the court said: "Those provisions of the ordinance granting the exclusive privilege to construct and maintain waterworks within the corporate limits of the town, and the exclusive use of its streets, alleys, sidewalks, public grounds, streams, and bridges, come within the condemnation of section 1 of the constitution of this state, which declares that 'perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed.' * * *

All authorities hold that no such exclusive privilege can be granted by a municipal corporation without express legislative authority."

The case of *Citizens Gas & Mining Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624, is also a well-reasoned decision on this principle of law where it is said: "The town trustees had no authority to grant the Elwood Natural Gas and Oil Company the exclusive right to use the streets of the town. A municipal corporation can not grant to any fuel or gas supply company a monopoly of its streets. There is nothing in the nature or business of such a company making its use of the streets necessarily exclusive. The spirit and policy of the law forbid municipal corporations from creating monopolies, by favoring one corporation to the exclusion of others. It is probably true that a municipal corporation may make a contract with a gas company for supplying light to the public lamps for a limited time, even though it be for a number of years; on this point, however, there is some conflict, but there is no conflict on the proposition that, in the absence of express legislative authority, a municipal corporation can not grant to any corporation the exclusive privilege of using its streets."

§ 163. Strict construction of statutory authority excludes implication.—And the Supreme Court of the United States in the case of *Freeport Water Co. v. Freeport*, Illinois, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 922, has said: "The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them."

That the general rule is in favor of the strict construction of the grant of power to the municipality in this connection and that the exercise of such power when granted to the municipality does not necessitate its giving exclusive privileges as an element of its special franchise is well stated in the case of *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. 135, decided in 1907, as follows: "The city, it is clear, in express terms and for consideration received, granted exclusive rights. The power of the city to do this is denied, and this makes the question in the case. The circuit court ruled against the existence of the power, applying to the statutes conferring power upon the municipalities of the state the rule of strict construction. The ruling is challenged by appellants, and it is contended that the general welfare clause and 'the mu-

nicipal power to furnish light carries with it the obligation to enter into all contracts and to exercise all subsidiary powers which the circumstances of the case require.' * * * A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction."

That franchises granted street railways will be strictly construed as to the streets over which they may operate is the effect of the decision in *Sacramento v. Pacific Gas & Electric Co.*, 173 Cal. 787, 161 Pac. 978, as follows: "And, finally, if doubt can be entertained upon the proposition, and it is certainly little enough to say that doubt can be entertained, that doubt, under all the authorities and under every principle governing the interpretation of such grants, must be construed in favor of the sovereign—the granting power—whose mandatory the city of Sacramento is. 'A grant of a franchise to construct and operate a railroad or other utility in the street is to be strictly construed, and, in cases of a fair doubt, in favor of the public as against those claiming under the grant.' Dillon, *Municipal Corporations* (5th edition), section 1233. The grant to a railway company of a right to occupy a street, whether by ordinance or by charter, must plainly appear. It should not be left to implication from general language which does not clearly show an intent to give the permission. *Chicago &c. R. R. Co. v. Chicago*, 121 Ill. 176, 11 N. E. 907."

To the same effect that all presumptions are construed in favor of the municipalities is the decision in the case of *Mitchell, South Dakota v. Dakota Central Tel. Co.*, 246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. 362, as follows: "But if the decision be not given that extent, as it was not by the district court, and if it be considered that the latter court had a right, as a federal court, to determine the existence of a contract and its elements, such right does not preclude a deference to the views of the state court, which, moreover, have the support of principles declared by this court, that grants of rights and privileges by the state or of any of its municipalities are strictly construed 'and whatever is not unequivocally granted is withheld; nothing passes by mere implication.' *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34, 50 L. ed. 353, 359, 26 Sup. Ct. 224; *Blair v. Chicago*, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. 427. The contentions of the company in the case at bar rest entirely upon implication,—the implication of a repeal of one ordinance by an-

other, which is never favored, though the ordinances expressed different purposes, and could and did co-exist for such purposes; and this implication is made to depend upon another,—that is, that the ordinary meaning of the words ‘Long-distance telephone,’ used in Ordinance No. 180, is translated to signify and derive meaning from the function of the instrumentalities employed, such as transmitters, receivers, poles, wires, switching devices, and battery systems.” In refusing to find power in the city to grant exclusive franchises the court said: “A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them.”

§ 164. **Conditional grants of exclusive franchises construed strictly.**—Where the right to grant exclusive franchises is expressly conferred on the municipality subject to any material condition, the court will give full force and effect to the condition by holding that the grant is void and of no effect and that it confers no special privilege or right unless the condition is performed. As it is stated in the case of *Westerly Waterworks v. Westerly, Rhode Island*, 75 Fed. 181, decided in 1896: “It is to be observed that there is strong authority for the proposition that general powers, such as are here granted, do not include the power to grant exclusive rights. * * * But a reading of chapter 975 shows that the contracts which town councils may make for exclusive franchises are on condition of payments to be made to the town on the amounts of earnings of the grantees. It seems to me clear that the town council had no power to ratify a grant of an exclusive franchise which did not contain such a condition. It is to be remembered that, if there was a ratification, it would operate only on this exclusive grant, since the validity of the contract in other respects is admitted, and, indeed, could hardly be disputed. I must conclude, therefore, for the purposes of this motion, that there is here no exclusive grant.”

§ 165. **Municipality an agent of the state.**—An additional reason why the courts limit the power of the city in this respect to such as is clearly conferred consists in the fact that the city acts merely as an agent of the state and that the state alone has

complete control over the streets of the city, the use of which naturally are essential to the operation of the municipal public utility. The municipality in exercising its power to regulate the use of its streets does not enjoy the power to grant the use to any particular public utility exclusively unless expressly conferred, for as the case of *Grand Rapids Electric Light &c. Co. v. Grand Rapids Edison Electric Light &c. Co.*, 33 Fed. 659, decided in 1888, expressed it: "To confer exclusive rights and privileges either in the streets of a city or in the public highways, necessarily involves the assertion and exercise of exclusive powers and control over the same. Nothing short of the whole sovereign power of the state can confer exclusive rights and privileges in public streets, dedicated or acquired for public use, and which are held in trust for the public at large. * * * It is perfectly clear that these provisions of the charter confer no exclusive or sovereign power and control over the streets of the city. * * * The authority of a municipal corporation to make contracts in respect to objects intrusted to its administrative care and supervision, as a local agency of the state, is one thing, while the power to grant exclusive franchises, which belongs to the sovereign, is another and essentially different matter."

The nature of the power which the city exercises in granting the special privileges in the form of a franchise to the municipal public utility is well described in the case of *Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. 20, decided in 1906, which was an action to require the city to compel the defendant to perform a contract for the construction and operation of a waterworks system for the benefit of the city and its inhabitants, where the court said: "The making of such a contract is not a delegation of a governmental function, but is an exercise of its business or proprietary powers. The charter of the city of Gadsden confers ample powers to authorize the making of this contract. At any rate this is one of the incidental powers of a municipal corporation. There being no limit, by constitution or statute, as to the length of time for which such contracts may be made, the court can not say that the time fixed in this contract is unreasonable. On the contrary, it is common knowledge that it requires a considerable outlay of money to construct a system of waterworks, and a considerable part of the material is buried under the surface of the ground so that no arrangement could be made for the construction of such a system, unless the contract be allowed to run for a number of years, so as to offer the hope of realizing something on the enter-

prise. * * * That part of the original contract which attempted to make the franchise granted exclusive is violative of section 22 of the Constitution of Alabama, and therefore incapable of enforcement."

§ 166. **Constitutional provision limits grant by state.**—Some of the state legislatures even do not enjoy the power to grant exclusive franchises because of constitutional limitations, and the municipality which acts as an agent of such states can not enjoy the right to grant exclusive franchises, although formally conferred upon it by express statutory authority. This is the effect of the decision in the case of *Birmingham & Pratt Mines St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615, decided in 1885, where the court said: "The franchise, it will thus be seen, is one not only exclusive in its nature, but in perpetuity, being without limit of duration, except as to an option to exercise it, which was to continue for ten years. When once put in exercise, it purports to last forever. * * * The argument is further made, that the general assembly is prohibited by the organic law from making such an irrevocable grant, and therefore under no circumstances can it be done by a municipal corporation, which is the mere agency of the state, exercising only derivative powers. The power of the agent, it is said, can not exceed that of the principal. * * * The exclusive right of the appellee to the privilege claimed, in our opinion, can not be sustained. The general assembly would itself have no power under the constitution to make such a grant. A fortiori, a mere municipality would have no such power. Nor can we find, upon any proper principle of construction, that it has anywhere been attempted to confer such a power upon the municipal authorities of Birmingham."

The leading case of *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, as early as 1856, defined this principle as the controlling one for municipal public utilities. In denying that the claim of the grantees to an exclusive franchise to lay gas pipes in the streets and to operate a system of gas works in the city protected them from prosecution for maintaining a public nuisance for using the streets in this way, as it gave them no right or title to the exclusive use of the streets which would prevent the defendant, a competitor, from enjoying similar franchise rights, the court said: "The resolution under which this right is claimed, purports to grant to Treadway and his assigns, for the period of fifteen years, the right to lay gas pipes in the streets; and it declares that no other person or corpo-

ration shall, by consent of the common council, lay gas pipes in said streets during that time. But the city does not own the streets. * * * And the right of way over them, being public to all who may have occasion to use them, and the only power of the city over them being given by their charter in order to regulate such use, it seems clear that the city can make no grant which shall convey to the grantee any interest in them, which can, in any proper sense, be deemed property. Besides, if the resolution of the court of common council be viewed in the light of a grant of an interest in the soil, it should have been perfected by a deed. No title, as such, can be transferred by a mere vote of a corporation, which will enable any one to hold any permanent interest in real estate."

§ 167. **Municipal control of streets impaired by exclusive franchises.**—The right of the city to regulate the use of its streets and to control the exercise of the special franchise privileges of municipal public utilities requires the city to regulate such use and the enjoyment of such rights continuously, which necessarily prohibits it from granting such exclusive franchise rights to any one because the effect of such a grant would be to pass the power of regulation and control out of the hands of the municipality and confer it upon the grantee of such franchise. The case of *Florida Cent. &c. R. Co. v. Ocala St. &c. R. Co.*, 39 Fla. 306, 22 So. 692, decided in 1897, indicates the necessity for the continuous exercise by the city of this power of control in the following language: "We discover no authority in this provision for the municipality to surrender its control over the streets of the city, or to tie up its hands by an exclusive contract, so as to preclude a subsequent council from exercising the trust vested in it over the streets for the benefit of the public. * * * While the ordinance under which appellee claims does undertake to vest in it the exclusive right to construct railroad tracks on all the streets of the city of Ocala as then laid out, or that might be opened for a period of ten years thereafter, we are of the opinion that it is void so far as such exclusive rights are concerned, on account of an absence of power in the municipality to confer them, and that it was within the power of a subsequent city council to exercise such control and regulation over the streets as conferred by statute."

The case of *Logan v. Pyne*, 43 Iowa 524, 22 Am. Rep. 261, decided in 1876, indicates the reason of public policy, for holding that while the city may continue to exercise this power of control it can not confer it on a public utility by the grant of an

exclusive franchise, for as the court said: "A municipal corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy.² * * * The grant of power to license, tax and regulate omnibusses and other vehicles, certainly can not be construed into the bestowal of authority to create monopolies in their use. * * * We conclude that the charter of the city of Dubuque confers no authority upon the municipal government to grant the exclusive privilege of running omnibusses and other vehicles, as is attempted in the ordinance under which the plaintiffs claim to recover in this case."

That the city can not bind itself by an exclusive contract under implied power is clearly decided in *Marquis v. Polk County Tel. Co.*, 100 Nebr. 140, 158 N. W. 927, as follows: "Indeed, to hold that an implied power to contract exists from the right to control the streets, and that contracts so made might not be impaired, might prove exceedingly detrimental to the public welfare. The progress of invention in the cheapening of processes has been so startling in recent years that a rate, which is fair to both parties now, may in the case of gas, electric light, power, transportation, or like companies yield in a few years an excessive profit on the capital invested. In such a case the public might be powerless to impair the obligation of the contract. The courts therefore will not hold that the exclusive power to contract exists unless plainly and expressly granted."

§ 168. Exclusive franchise prevents municipal control.—The importance of this rule of public policy retaining in the state or municipality at all times in its full force this power to regulate and control the municipal public utilities and the streets and highways, the use of which are so essentially necessary to the operation of such public utilities, is well stated in the case of *New Orleans City &c. R. Co. v. New Orleans*, 44 La. Ann. 728, 11 So. 78, decided in 1892, as follows: "Unless the terms of the delegation embrace expressly the power to grant exclusive rights, or are so sweeping as to operate a complete abdication of the whole legislative power in favor of the corporation, it can not

² *Minturn v. Larue*, 23 How. (64 U. S.) 435, 16 L. ed. 574; *Charles River Bridge v. Warren Bridge*, 11 Pet. (36 U. S.) 420, 9 L. ed. 773; *State v. Cincinnati Gas Light &c. Co.*, 18 Ohio St. 262.

be held to include such extraordinary power, the possession of which even by the legislature is not free from dispute.³ * * * A different conclusion from that which we have reached would be nothing less than a public calamity. * * * While valid contract rights must be respected, or only interfered with in the constitutional exercise of the power of eminent domain, claims to exclusive privileges, under grants which are ultra vires, can not be permitted to thwart or obstruct the municipal discretion in the administration of this important public trust, confided to them to be exercised for the benefit of the people."

A further statement of this principle based on the same reasoning is furnished in the case of *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546, decided in 1889, as follows: "The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant exclusive privileges, especially to put mains, pipes, and hydrants in its streets; nor could it lawfully, by contract, deny to itself the right to exercise the legislative powers vested in its common council. It can not well be claimed that any express power was delegated to the municipality to grant any exclusive franchises; and public policy will not permit the inference of authority to make a contract inconsistent with the continuously operative duty to make such by-laws, rules, and regulations as the public interest or welfare of the city may require."

§ 169. **Exclusive franchise held unnecessary.**—By way of reply to the claim that it is necessary to grant an exclusive franchise to a municipal public utility in order to secure the conveniences of public utilities which are now regarded as necessities, it is shown in the case of *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650, decided in 1887, to be limited to absolute necessity as follows: "It is certainly not essential or necessarily incident to the power, expressly granted, 'to lay off streets,' etc., 'and light the same,' that the city should delegate to a private individual or corporation the exclusive right to furnish such light, and use the streets for that purpose. To justify such a construction, it must appear that in no other proper or reasonable manner could the city provide lights for its streets and inhabitants. It not only does not so appear in this instance, but we know the fact is otherwise from public history. * * * It would plainly be a manifest violation of the cardinal

³ See Elliott, *Roads and Streets*,
§ 1047, p. 1429 (4th ed.).

principles above stated to imply that the legislature intended to confer upon the city the power to contract away to a private corporation the exclusive right to furnish such light, and thereby deprive itself of all power or control over the matter. My conclusion therefore is that the city acted beyond the scope of its powers in passing the ordinance of December 2, 1864, if, as claimed by the appellee, the gas company, in its bill, it thereby attempted to irrevocably confer upon the gas company the exclusive right for thirty years to light the city, and use its streets for that purpose; and that its act was *ultra vires*, and is void, to the extent that it attempts to confer such exclusive right."

§ 170. **Limitation.**—A reasonable limitation on the power of the city to compel one public utility to make way for another is indicated in the case of *Los Angeles Gas & Electric Co. v. Los Angeles, California*, 241 Fed. 912, P. U. R. 1917F, 833 (affd. in *Los Angeles, California v. Los Angeles Gas & Electric Co.*, 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 121): "If the engaging of the city in the business of furnishing electrical energy to itself and its inhabitants is in all respects a purely private venture as thus indicated, and if it is to be accorded the same and no other consideration than any other private venture of the same character, it would seem indubitably clear that the city, acting in its governmental capacity, would have no authority to confer rights upon its own lighting system, based upon and growing out of a destruction and disregard of the rights of other systems engaged in the same business and standing in the same relation to the law. And this would seem to be true whether we accept the conclusion of the majority of the court, or the concurring opinion of Mr. Justice Shaw, in the California case just cited, 149 Cal. 69, 75, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847. So understanding the law, it would hardly be contended, and if contended would hardly meet with judicial approval, that the city, in the exercise of its police power or otherwise, possesses authority to provide that one public utility company having a lawful franchise to serve the city, and serving it, can be compelled to move or relocate its properties in order that another company similarly engaged may be installed or be enabled to carry on its business."

CHAPTER 9

NO EXCLUSIVE FRANCHISE BY IMPLICATION

Section	Section
175. Strict construction of special franchise grants.	181. No sale of franchise to highest bidder which defeats competition.
176. Contract of franchise can not be impaired.	182. Strict construction as to subject-matter of franchise.
177. Franchise not exclusive subject to competition.	183. Rigid enforcement of conditions of grant.
178. Power of competition to destroy franchise rights.	184. Rights of street railway exclusive where installed.
179. Municipality not excluded unless franchise exclusive.	185. Franchise grants subject to those already issued.
180. Street railway limited to streets actually occupied.	186. Franchise not exclusive excludes all without franchise.

§ 175. **Strict construction of special franchise grants.**—Unless the franchise rights which are granted to a municipal public utility are expressly made exclusive, the courts will refuse to find such rights to be exclusive by implication. This policy of the strict construction of such special franchise privileges granted by municipalities, which is of universal application, is strictly adhered to in defining the franchise rights of municipal public utilities for the purpose of preventing the public interest and general welfare of the municipality and its inhabitants being ignored in the interest of the municipal public utility for the sake of its private gain.

§ 176. **Contract of franchise can not be impaired.**—Under the decision of *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, establishing the doctrine that a corporate charter is a contract and that, when accepted and acted upon, the franchise rights creating the body corporate become vested, the courts have consistently protected these corporate rights and the special franchise rights to street privileges when conferred on municipal public utilities under proper authority duly executed and accepted. The decisions, however, have just as consistently adhered to the principle of their strict construction and have refused to find the franchise to be exclusive unless expressly made so by the municipality acting with the necessary power.

§ 177. Franchise not exclusive subject to competition.—

In following the early decision of the case of *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, to the effect that, in the absence of the right reserved, the charter when granted, accepted and acted upon can not be repealed or materially altered, the courts have universally held that it is not a necessary corollary to this that a special franchise to use the streets may not be granted to others although its exercise impairs the value of the former grant by creating competition; provided, of course, that the first franchise granted was not in terms and on proper authority made exclusive. The courts have in all cases clearly made the distinction between impairing charter contract rights directly as was attempted in the *Dartmouth College* case and creating competition by granting similar special franchise privileges to others, although the effect of doing so necessarily impairs the value of the grant first made. This well-defined legal distinction necessarily retains control of the use of the streets in the state or the municipality, whose agent it is; and gives force and effect to the exercise of the necessary police regulation and to the rule that a legislative or governmental power of the state can not be surrendered or bartered away even by an express contract of the municipality.

Under a statute providing for supervision and regulation of public utilities by the public service commission, the commission does not have the authority to grant or regulate the issue of a franchise where the municipality is given the right by statute to grant the franchise, nor may the commission insist upon the public utility's securing a certificate of public convenience or necessity from it, because, as the court indicates, the commission has nothing to do with the creation of the franchise. As monopolies are not favored and exclusive rights are not permitted under the policy of the state of Louisiana, the court refused to permit the commission to control the situation, otherwise it might create a monopoly. As the court said in the case of *Richland Gas Co. v. Hale*, 169 La. 300, 125 So. 130, P. U. R. 1930B, 352: "The power to grant gas franchises has been vested by the legislature in the municipalities of the state, and not in the Louisiana public service commission. The power to confirm and validate such franchises has been exercised directly by the legislature in the recent enactment of Act No. 80 of 1928. The commission has the power to supervise and regulate public utilities as it finds them. It has nothing to do with creating or bringing them into existence. That is a matter for other

branches of the government. * * * There is no law of this state requiring the grantee of a municipal franchise to secure from the commission a certificate of public convenience or necessity before engaging in the business provided for by the franchise. * * * If a public utility can not operate as such without obtaining a certificate of public necessity or convenience, and if the commission has the power to withhold such certificate, then it has the power to prohibit the operation of such utility and to confiscate its property. Such is not the law in this state. Besides, the commission, by refusing such certificate, would have the power to create a gas monopoly in the town of Rayville, contrary to the fixed public policy of the state, declaring that gas franchises shall not be exclusive. * * * 'Exclusive rights to public franchises are not favored. They must be specially provided for.' *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921. As to the impairment of the contract implied in the first franchise granted to the Richland Gas Company by the granting of a second franchise to the Rayville Gas Company, it is well settled that: 'If a state grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which itself largely manages and profits by to the injury of the first.' *Washington & Baltimore Turnpike Co. v. State of Maryland*, 3 Wall. (70 U. S.) 210, 18 L. ed. 180."

§ 178. **Power of competition to destroy franchise rights.**—Where the state has granted an exclusive contract to operate a ferry in the nature of a lease to that effect, this action will not prevent the state from granting the right to construct bridges over the rivers although they would operate in competition with the ferry to which an exclusive lease had been granted by the state. Under the doctrine of strict construction, the granting of an exclusive ferry right will not be construed so as to exclude grants to build bridges at the same points where such ferries are operating. This principle is well recognized and clearly enunciated in the case of *Larson v. State of South Dakota*, 278 U. S. 429, 73 L. ed. 441, 49 Sup. Ct. 196, where the court expressed the rule as follows: "The exclusive ferry leases were contracts between the state and the petitioner. *Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.)* 3 Wall. 51, 18 L. ed. 137. Was the building of the bridge a breach of them? * * * The chapter of the Revised Code of the state immediately preceding that which directs the letting and granting of exclusive ferry leases provides for the building of

bridges over the rivers of South Dakota. This close relation of the chapters suggests that if bridges were intended to be forbidden by the contract, the parties would have been likely to mention a bridge as a breach. But there is no mention of a bridge in the statute or contract dealing with ferries. * * * The principle of the case is that public grants are to be strictly construed, that nothing passes to the grantee by implication. * * * We can hardly say, therefore, from the weight of authority, that an exclusive grant of a ferry franchise, without more, would prevent a legislature from granting the right to build a bridge near the ferry. Following the cases in this court in its limited and careful construction of public grants, it is manifest that we must reach in this case the same conclusion. The judgment of the Supreme Court of South Dakota is affirmed."

This principle of law involves an application of one of the earliest rules of our jurisprudence prohibiting the creation of monopolies and has been fully and generally recognized as of universal application to the field of municipal public utilities since its definition in the decision of the famous leading case of *Charles River Bridge v. Warren Bridge*, 11 Pet. (36 U. S.) 420, 9 L. ed. 773, where the court held that a grant, even by the state legislature, of the right to maintain and operate a bridge across the Charles river was not exclusive because not made so expressly, but that the state thereafter had the power to grant a similar right to another company permitting it to erect another bridge over the Charles river nearby the one first erected, and on condition that the use of the bridge to be erected would become free from tolls within a few years after its completion and belong to the state; although this in effect destroyed the right of the Charles river bridge to take tolls by diverting traffic to the Warren bridge when it became the property of the state free of tolls.

This decision in effect holds that while competition might impair the value of franchise rights already granted, this did not constitute such an invasion or impairment of franchise rights as to come within the meaning and under the protection of the constitution. There is nothing in the rights granted in the first franchise which insures the grantee against possible competition in the future by another company to which similar rights might be granted by the municipality, because the state and its agent can not be so limited in their power to grant special franchise privileges by implication; but only within constitutional limitations and by express agreement, although in effect, the material consequences may entail serious loss and even absolute ruin up-

on existing corporations as the result of competition coming from the granting of similar rights to other parties. These hazards are necessarily assumed by the grantees of such charter rights unless they are expressly guarded against in the grant.

§ 179. **Municipality not excluded unless franchise exclusive.**—The right to exclude competition which belongs to the grantee of an exclusive franchise was not generally regarded as beneficial to the municipality or its inhabitants, for as it defeats competition and destroys the control secured thereby, it was naturally regarded as inimical to the public good and the general welfare and was held to redound to the benefit and advantage of the municipal public utility. Since this right to exclude competition operates for the benefit of the municipal public utility, the franchise will not be deemed exclusive if there is another equally reasonable construction possible; for the special franchise rights granted which provide for the furnishing to the municipality and its inhabitants of the conveniences of public utilities are mutually for their benefit and that of the company providing the utility, and are employed as the means of securing proper public utility service. Nor will the grant of a franchise by the municipal corporation in itself, unless it so stipulates, exclude the municipality from furnishing municipal public utility service any more than it will restrict the municipal corporation from granting similar franchise rights to other corporations. The grantee of such a franchise, which is not clearly exclusive, acquires no right by virtue of the grant to object to the issue of similar franchises to others or to the exercise of the power vested in the municipal corporation itself to own and operate its own utility systems, since, as before stated, no power to grant exclusive franchises will be found in municipalities by implication; so for the same reasons no franchise granted by a municipal corporation will be held to be exclusive by implication.¹ Unless the municipality

¹ **United States.** *Detroit Citizens St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. 732; *Knoxville Water Co. v. Knoxville, Tennessee*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224; *Blair v. Chicago, Illinois*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; *Milwaukee Elec. R. &c. Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174, 59 L. ed. 1254, 35 Sup. Ct. 820; *Larson v. State of South Dakota*, 278

U. S. 429, 73 L. ed. 441, 49 Sup. Ct. 196.

Federal. *Citizens St. R. Co. v. Jones*, 34 Fed. 579, *affd.* in 145 U. S. 633, 36 L. ed. 855, 12 Sup. Ct. 979; *Madera Waterworks v. Madera, California*, 185 Fed. 281, *affd.* in 228 U. S. 454, 57 L. ed. 915, 33 Sup. Ct. 571; *Washington-Oregon Corp. v. Chehalis, Washington*, 202 Fed. 591; *Glenwood Springs, Colorado v. Glenwood Light &c. Co.*, 202

expressly excludes itself in the granting of franchises, it may enter the field itself, for as the court said in *United Railroads v. San Francisco, California*, 239 Fed. 987, P. U. R. 1917E, 523²: "It is very important to note that the words of direct expression or intention to grant an exclusive franchise are not to be found in the instrument itself; nor does it appear that exclusiveness was a positive consideration for the contractual obligation. Nor is there any expression by apt words to show that the city intended to exclude itself from exercising the privilege of establishing a street railway of its own. No deliberate purpose to

Fed. 678, L. R. A. 1915C, 438, appeal dis. in 231 U. S. 735, 58 L. ed. 459, 34 Sup. Ct. 315, cert. denied in 231 U. S. 751, 58 L. ed. 466, 34 Sup. Ct. 322; *United Railroads v. San Francisco, California*, 239 Fed. 987, P. U. R. 1917E, 523, affd. in 249 U. S. 517, 63 L. ed. 739, 39 Sup. Ct. 361; *Hill v. Elizabeth City, North Carolina*, 291 Fed. 194, affd. in 298 Fed. 67; *Southern Counties Gas Co. v. Long Beach, California*, 295 Fed. 530; *Mutual Oil Co. v. Zehrung*, 11 Fed. (2d) 887.

Alabama. Montgomery Light & Co. v. Citizens Light, Heat & Co., 142 Ala. 462, 38 So. 1026.

Arkansas. El Dorado v. Coats, 175 Ark. 289, 299 S. W. 355, P. U. R. 1928B, 351.

California. Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61.

Connecticut. New Hartford Water Co. v. Village Water Co., 87 Conn. 183, 87 Atl. 358.

Florida. Capital City Light & Co. v. Tallahassee, 42 Fla. 462, 28 So. 810, affd. in 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. 866.

Illinois. Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329; *Peoria R. Co. v. Peoria R. Terminal Co.*, 252 Ill. 73, 96 N. E. 689; *Metropolitan West Side Elevated R. Co. v. Chicago*, 261 Ill. 624, 104 N. E. 165.

Indiana. Crowder v. Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647.

Kansas. Coffeyville Mining & Co. v. Citizens Nat. Gas & Co., 55 Kans. 173, 40 Pac. 326; *Humphrey v. Pratt*, 93 Kans. 413, 144 Pac. 197.

Louisiana. Hourns Lighting & Co. v. Hourns, 127 La. 726, 53 So. 970; *Richland Gas Co. v. Hale*, 169 La. 300, 125 So. 130, P. U. R. 1930B, 352.

Michigan. North Michigan Water Co. v. Escanaba, 199 Mich. 286, 165 N. W. 847.

Missouri. Memphis Elec. Heat, Light & Co. v. Memphis, 271 Mo. 488, 196 S. W. 1113.

Nebraska. Bell v. David City, 94 Nebr. 157, 142 N. W. 523; *Minden Edison Light & Co. v. Minden*, 94 Nebr. 161, 142 N. W. 673.

New Jersey. Millville Gas Light Co. v. Vineland Light & Co., 72 N. J. Eq. 305, 65 Atl. 504.

New York. In re Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

Oklahoma. Sapulpa v. Sapulpa Oil & Co., 22 Okla. 347, 97 Pac. 1007; *Bartlesville Elec. Light & Co. v. Bartlesville Interurban R. Co.*, 26 Okla. 456, 109 Pac. 228; *Tulsa St. R. Co. v. Oklahoma Union Trac. Co.*, 27 Okla. 339, 113 Pac. 180.

Pennsylvania. Citizens Elec. Illuminating Co. v. Lackawanna & Co. Power Co., 255 Pa. 145, 99 Atl. 462, P. U. R. 1917E, 540.

Texas. Memphis v. Browder (Tex.), 174 S. W. 982; *Fink v. Clarendon (Tex.)*, 282 S. W. 912; *Lindsley v. Dallas Consol. St. R. Co. (Tex. Civ. App.)*, 200 S. W. 207.

West Virginia. Wheeling v. Natural Gas Co., 74 W. Va. 372, 82 S. E. 345.

² Affirmed in 249 U. S. 517, 63 L. ed. 739, 39 Sup. Ct. 361.

make a surrender of exclusive rights appearing, I accept the more reasonable interpretation of the language used, and regard the franchise as not conferring such exclusive right as against the city, unless it must be held that the law itself operates to make the franchise exclusive *pro tanto*."

To the same effect is the decision of *Hill v. Elizabeth City*, 291 Fed. 194:³ "The grant not being exclusive does not interfere with, or restrict, the right of the city to establish, construct, and operate a system of electric lights, water, and sewerage."

A franchise right, granted by a municipality, will not be construed to be exclusive, either as to other privately owned public utilities or the municipality itself, unless it is expressly made exclusive by the municipality, acting under proper authority to that effect, because it may be or may come to be to the best interests of the public to retain the right to create competition in the public service, either public or private. This principle is well recognized and clearly expressed in the case of *Southern California Utilities, Inc. v. Huntington Park*, 32 Fed. (2d) 868: "The right of a municipal corporation to grant a franchise to construct a water system to supply water for the use of itself and its inhabitants for a limited period, exclusive even as against itself, is well settled. But it is equally well settled that a grant of such rights and privileges is strictly construed, and whatever is not unequivocally granted is withheld. Nothing passes by implication. * * * So in this case the grant of 1903 was made by the board of supervisors as a mere agent of the state. The agent was powerless to limit the authority of its principal, and it made no attempt to do so. The appellant does not claim that the grant was exclusive in its terms, but simply that the grant was necessarily exclusive, because of the fortuitous circumstance that the grantor was without authority to lay pipes in its highways and streets for the purpose of supplying water to its inhabitants at the time the grant was made. But the assignor of the appellant accepted the grant with full knowledge of the fact that the state might grant the same rights and privileges to others, or to a municipal corporation to be thereafter created, and the appellant is in no position to complain even if the unexpected has happened. In any view we take of the case, therefore, the claim of the appellant is without merit, and the decree is affirmed."

§ 180. Street railway limited to streets actually occupied.—The case of *Citizens St. R. Co. v. Jones*, 34 Fed. 579,⁴ enunciates

³ Affirmed in 298 Fed. 67.

⁴ Affirmed in 145 U. S. 633, 36 L. ed. 855, 12 Sup. Ct. 979.

this principle and indicates that the courts impose the further practical limitation denying the municipal public utility providing transportation the exclusive right to use all the streets of the municipality for street railway purposes by limiting it to the use of those streets along which it has constructed its railway. In sustaining the right of a competing transportation system to operate along streets not occupied by the grantee of the first franchise, under which it claimed exclusive right to the use of all the streets of the municipality for street railway purposes, the court said: "The power granted to the mayor and council to contract on this subject, is, as the act in terms declares, 'for the purpose of providing * * * street railroads,' and it is for that purpose they are authorized to grant 'for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose. * * *' Section 755, Mansf. Dig. It is the actual use of the street for the purpose that confers the exclusive privilege. * * * The power and duty of determining when and on what streets the public convenience requires street railroads is devolved by law on the city council, and that body can not refuse to discharge this function, or devolve it on a street car company, whose action would be controlled by its own, rather than the public interests. But this is exactly what it is said was done. Whether any more than a few hundred feet of railroad, on one street, should be constructed in a populous and growing city for a period of ninety years, is left to the discretion of the street car company; or, as it is expressed in the contract, 'as the parties of the second part think public necessities require.'"

§ 181. No sale of franchise to highest bidder which defeats competition.—The reason for this rule is well expressed in the case of *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, decided in 1900, where the court denied the right of the municipality to sell the franchise to the highest bidder for the reason that this would exclude other public utility concerns and destroy competition, which was contrary to the provisions of the state constitution, for as the court said: "The constitution intended that there should be no restriction upon competition in supplying these prime necessities, as would necessarily result if the privilege could only be granted to the highest bidder, for such bidder would necessarily secure an exclusive right to the exercise of the franchise; the only condition imposed by the constitution being the right of the municipality 'to regulate the charges thereof.' * * * We think it clear, however, that under said prof-

vision of the constitution the duty of the trustees to grant the franchise demanded by the plaintiff, subject only to the regulations and conditions therein imposed, is imperative, and that a prior grant of a similar franchise or privilege to other persons or corporations is no reason why the plaintiff's demand should not be granted. It is true, it does not expressly appear that the trustees had made any 'general regulations' for 'damages and indemnity for damages' for the privilege of using the public streets for the purpose specified; but it does appear that a privilege identical with that sought by the plaintiff was granted to the development company, and the writ of mandate granted to the plaintiff is that the same privilege be granted to him as was granted to the development company, and this necessarily includes the regulations imposed upon that company."

§ 182. Strict construction as to subject-matter of franchise.—The reason for strictly construing the subject-matter of a franchise, which is generally recognized, is defined in the case of *Southern Counties Gas Co. v. Long Beach, California*, 295 Fed. 530, where the court said: "Construing this provision, the Supreme Court of California declared its purpose in the main to be that competition should be encouraged in the public utility lines referred to in the provision, and monopolies prevented. This construction as a corollary required that the interpretation of the language used be liberal to make effectual the design of the people. Such a construction necessarily affected the application of the rule which requires that public franchises, whether arising out of constitutional or legislative grants, are subject to narrow construction as against the grantee and in favor of the granting power."

This rule may be liberalized by the construction the parties themselves have placed on the franchise. Thus a municipal grant of a franchise to do a general electric light business may be deemed to include the distribution of electric current for power and heating as well as for lighting, where such has been the practical interpretation of the franchise by both the city and the grantee, when the courts of the particular state apply the doctrine of practical interpretation of contracts to public-service franchises. *Old Colony Trust Co. v. Omaha, Nebraska*, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. 974.⁵

⁵ The *Old Colony Trust Company* Case above-mentioned involved the same franchise that was under consideration in the case of *Omaha*

Electric Light & Power Co. v. Omaha, Nebraska, 172 Fed. 494, in which it was held that a grant to a public utility to do a "general electric light

Under the well-recognized principle that all franchises shall be strictly construed in the interest of the public, although the municipality has the power to grant an exclusive franchise, no franchise grant will be treated or construed as being exclusive by implication. Unless the franchise is expressly made exclusive, such a municipal grant will be construed as not exclusive, although the municipality could have made it so, if it had cared to do so or considered such a grant necessary or for its best interest in the particular case. This principle is generally accepted as sound and is clearly expressed in the case of *El Dorado v. Coats*, 175 Ark. 289, 299 S. W. 355, P. U. R. 1928B, 351, as follows: "A state or council ought never to be presumed to surrender this power, because the whole community have an interest in preserving it undiminished; and, when a corporation alleges that the state or council have surrendered its power of improvement and public accommodation, abandonment ought not to be presumed in a case in which the deliberate purpose of the state or council do not appear. * * * The * * * words 'not exclusive' clearly show that it was not an exclusive contract. The ordinance granting the franchise alone making the contract, the question, therefore, to be determined in cases of this kind, when the legislative interference is claimed, is whether such interference impairs the obligation of the contract, for there may be legislation such as to injuriously affect the interest of those with whom such contracts exist, and yet impair no obligation of contracts. * * * Under the rule of law herein announced the appellee did not have an exclusive contract or franchise. This doctrine is vital to the public welfare. * * * We are of the opinion, that, under the language of this section, the council may have granted to the appellees an exclusive franchise or not, as in their judgment seemed best. Not having granted such a franchise, there is nothing in this section that makes it exclusive."

Under the well-recognized policy of the strict construction of franchises and in harmony with the constitutional provisions on the subject, the court will not permit a municipality, in granting franchises and in fixing the rates for public utilities, to barter away its police power by providing for a permanent irrevocable

business" did not confer the right to transmit current for purposes other than lighting. This federal case was reversed on other grounds in 179 Fed. 455; whereupon an appeal was taken to the United States

Supreme Court which handed down a decision dismissing the appeal. *Omaha Electric Light & Power Co. v. Omaha, Nebraska*, 230 U. S. 122, 57 L. ed. 1419, 33 Sup. Ct. 974.

rate, as is indicated in the case of *Baton Rouge v. Baton Rouge Waterworks Co.*, 30 Fed. (2d) 895, P. U. R. 1929D, 316, where the court said: "The Louisiana Constitutions of 1879 (article 235), 1898 (article 263), and 1921 (article 19, section 18) all contain a provision to the effect that 'the exercise of the police power of the state shall never be abridged.' * * * It is clear that this court there held that the constitution of Louisiana, as construed by the Supreme Court of Louisiana, in the case of *State of Louisiana v. City of New Orleans*, 151 La. 24, 91 So. 533, forbids a municipality, invested with the authority to grant franchises and fix rates for local public utilities, from irrevocably surrendering or bartering away its police power by fixing by contract irrevocable rates. * * * If the Louisiana constitution stood in the way of an agreement for irrevocable rates, it would likewise stand in the way of a compromise decree, attempting to sustain such an agreement. *Kelley v. Millan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77."

§ 183. **Rigid enforcement of conditions of grant.**⁶—The rule of the strict construction of these franchise grants is further enforced by requiring the complete performance of all conditions upon which the grant may be made before its privileges may be enjoyed and until conditions so imposed are performed and until the corporation begins to furnish the services which constitute the consideration for the grant, the courts hold that there are no vested rights to be protected within the meaning of the constitution. This rule of limitation is imposed for the further practical reason of preventing speculation in such franchise rights so that as is stated in the decision in the case of *Capital City Light & Fuel Co. v. Tallahassee*, 42 Fla. 462, 28 So. 810,⁷ decided in 1900: "All such grants are strictly construed against the grantee, and nothing passes thereby but such as is clearly intended.⁸ Under the express language of this statute, the exclusive privilege did not attach until the corporation was not only organized, but put into successful operation, and the privileges were to attach for twenty years from the time the corporation commenced to carry out in good faith the terms of its articles of incorporation. The condition upon which attached

⁶ This section of third edition cited in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

⁷ Affirmed in 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. 866.

⁸ *Saginaw Gas Light Co. v. Saginaw, Michigan*, 28 Fed. 529; *Florida, A. & C. R. Co. v. Pensacola & C. R. Co.*, 10 Fla. 145; *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

the exclusive privilege, so far as the electric light plant was concerned, has never been performed. * * * In the next place, even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right, so as to be protected by the Constitution of the state or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege.⁹ It would be going too far to hold that the clauses of those constitutions protecting the obligations of contracts from impairment would enable one legislature to tie the hands of another in matters of public convenience and interest, such as lighting cities, by granting charters containing exclusive privileges to perform these public benefits which are held for speculative or other purposes, without attempting to execute the powers granted.”¹⁰

§ 184. Rights of street railway exclusive where installed.—While the granting of a franchise to own and operate a street railway company is naturally and necessarily exclusive as to the privilege to use the streets in which tracks are actually laid and transportation furnished which constitutes the consideration for the grant and makes a binding contract, the city may thereafter grant similar rights for the use of other streets to a different company, for as is stated in the case of *Peoria R. Co. v. Peoria R. Terminal Co.*, 252 Ill. 73, 96 N. E. 689, decided in 1911: “A city may grant the right to a second company to construct and operate a street railway system over and upon its streets, provided the same can be done without necessarily appropriating that portion of the streets which has been granted to the first company, and which is being used by it in the operation of its railway system. While a street railway company can not, by ordinance, be given the exclusive right to the use of the streets of the municipality, when it is granted the right to construct and maintain a street railway system for a definite period, it is thereby given the exclusive right to that portion of the streets granted to it for use for street railway purposes during the time of the grant, and during that time has the right to exclude other

⁹ *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. 705; *Louisville &c. R. Co. v. State of Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714. See

also, *Chincelamouche Lbr. &c. Co. v. Com.*, 100 Pa. 438.

¹⁰ *Gonzales v. Sullivan*, 16 Fla. 791; *Elliott, Roads & Streets* (4th ed.), § 1047, p. 1429 et seq.

street railway companies from the use of its tracks and the space occupied by its cars.”¹¹

§ 185. Franchise grants subject to those already issued.— Unless the particular municipal public utility secures an exclusive franchise from the city acting with proper authority, it is not in position to prevent a competitor, who has secured similar rights, from installing and operating another public utility plant; and although the city has attempted to grant the exclusive right to a single municipal public utility it is not thereby prevented from granting a similar franchise to another where it had no power to make the franchise exclusive. The enjoyment of the rights granted in the second franchise, however, is subject to such use as is not inconsistent with the exercise of the rights granted in the first franchise and avoids actual physical interference by the system of wires, pipe lines, tracks and the like of the grantee of the second franchise with the rights granted by the former franchise, for as is stated in the case of *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, decided in 1902: “Wherever telephone companies occupy the public streets with their poles and wires, there will, as a matter of course, be some interference between them. The thing to be guarded against is such an interference as will prevent the practical operation of any one telephone system. In other words, it was and is the duty of appellee so to construct and use its telephone system as not unnecessarily and unreasonably to interfere with the operation by appellant of its system. To grant any one company the exclusive right to use the streets would be to establish a monopoly.”

The limitation which is placed on the exercise of the later franchise grant is well expressed in the case of *Montgomery Light &c. Co. v. Citizens Light, Heat &c. Co.*, 142 Ala. 462, 38 So. 1026, decided in 1905, where the court said: “So far as the public streets of a city are concerned, neither party can assert any exclusive rights thereon. Under the constitution of Alabama, it is not within the power of a municipal corporation to grant any exclusive privilege in its streets to any corporation, so as to deprive itself of the right to revoke the same and grant like privileges to another.”¹² Though, unquestionably, the munic-

¹¹ *City R. Co. v. Citizens St. R. Co.*, 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. 653; *Barsaloux v. Chicago*, 245 Ill. 598, 92 N. E. 525, 19 Ann. Cas. 255; *Hamilton G. &c. Trac. Co. v. Hamilton &c. Elec.*

Transit Co., 69 Ohio St. 402, 69 N. E. 991.

¹² Constitution of Alabama, § 22; *Birmingham &c. St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

ipality, after granting to a corporation the right to use its streets for a public utility, has the right, in granting like privileges to another, to provide such restrictions and regulations as are necessary to prevent injury to the property of the first occupant, and to prevent an interference with its discharge of the duties assumed to the public; and, where such interference involves danger to the public, the courts will prevent it, even without any ordinance.¹³ In the present case it is shown that the defendant company was granted by the city of Montgomery like rights and franchises on the streets of the city as had been granted to complainant, with a special proviso 'that the poles and wires of said Citizens Light, Heat & Power Company should not be erected and strung so as to interfere with the poles and wires of the complainant company.'"

§ 186. Franchise not exclusive excludes all without franchise.¹⁴—Where the municipal public utility does not have an exclusive franchise to the use of the streets, it may prevent the installation, maintenance, and operation of a similar public utility plant by another company which has not secured a franchise, on the theory that rights granted in a franchise although not in terms exclusive are actually so as to all others not having similar franchises, for as the court in *Bartlesville Electric Light & Co. v. Bartlesville Interurban R. Co.*, 26 Okla. 456, 109 Pac. 228, decided in 1910, said: "Plaintiff does not insist in this court that the exclusive provision of its franchise is valid, but it seeks to maintain its action upon the theory that, notwithstanding it has no exclusive franchise and the city has authority to grant a similar franchise to other persons, the use of the streets, alleys, and public places of the city by defendant without legislative authority from the municipal corporation is such an infringement on plaintiff's rights that it is entitled to injunctive relief. * * * By its unlawful acts defendant can and will take from plaintiff a portion of its business. * * * Its right to sell light and power is not dependent upon any franchise, but its right to use the streets and public grounds of the city for that purpose does depend upon the consent of the city; and, when it uses the streets without that consent, it is not only guilty of

¹³ Consolidated Elec. Light Co. v. Peoples Elec. Light & Co., 94 Ala. 372, 10 So. 440.

¹⁴ This section of third edition cited in *Northern Texas Utilities Co.*

v. Community Nat. Gas Co. (Tex. Civ. App.), 297 S. W. 904, *affd.* in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

maintaining a public nuisance, but also inflicts upon plaintiff a special injury by its unlawful act which may be restrained."

That the municipal public utility may protect its right to the exclusive exercise of the privileges granted in the franchise as against all trespassers or parties attempting to exercise similar rights without a franchise because the right is not one belonging to the people generally but results from the grant of special privileges which constitute the consideration for the furnishing of the particular convenience or public utility is well expressed in the case of *Tulsa St. R. Co. v. Oklahoma Union Trac. Co.*, 27 Okla. 339, 113 Pac. 180, decided in 1910, in the following language: "If the grantee of a franchise has a privilege under the franchise which is exclusive as to those who have not a similar privilege, and such privilege is private property, what reason is there for denying to the owner of such privilege the same remedy to protect that property when special injury is inflicted upon it by one maintaining a public nuisance that is given to other owners of private property? If an abutting owner is especially injured by a railway company who occupies the streets without legislative authority, it would not be questioned that such abutting owner would have his remedy to enjoin the nuisance because of the special injury he suffers. Nor could the defendant in such an action oust the court of jurisdiction by pleading that it acted under a franchise, when in fact it did not, or by pleading that it acted under a franchise which was granted by a body without authority. * * * So in the case at bar we say it is plain that the council in granting understood that the use of streets thereafter to be added to the city by extending the city limits was granted by the general terms of the ordinance, and, to save extensions of certain streets from its operation, it excepted them from the general terms, just as it excepted specifically named streets."

Where the municipality has the power in its discretion to grant or refuse franchises it may in effect make its franchise exclusive by failing and refusing to grant others. As the court said in the case of *Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 82 S. E. 345: "While our cases hold, with the decisions of many other states, that exclusive grants may not be given to persons or corporations for public utilities, nevertheless where a municipal corporation has the right of arbitrarily refusing grants to more than one person or corporation such grant may operate to create a monopoly, but not one inhibited by law. The rule is different, of course, in those jurisdictions where such discretion has been

taken away or not conferred upon municipal authorities. Though municipalities derive their powers from constitutional or legislative grants, they may by the exercise of their discretionary powers refuse rights to others and thereby maintain monopolies in themselves, but the monopolies thus enjoyed are not unlawful or within the ancient definition of a monopoly, inhibited by law. When a municipality is given authority as here, to supply its inhabitants with gas, water, light or electricity, or any other commodity, it must be assumed that it was the legislative intent that it might occupy the field to the exclusion of all others, without violating any rule of law or public policy."

A valuable discussion and summary of the principle of the right of the owner of a franchise to enjoin competition at the hands of one attempting to operate without a franchise is found in the case of *Lindsley v. Dallas Consolidated St. R. Co.* (Tex. Civ. App.), 200 S. W. 207: "The cases are in conflict, while the text-writers are in agreement. Some of the cases hold, in substance, that one public utility may not challenge the authority of a rival to engage in a similar business on the ground that questions relating to the regularity of charters and the validity of franchises are to be challenged alone by constituted public authority. * * * Other cases in analysis hold that the right to use public streets depends upon legislative grant, and that the use thereof by public utilities without authority is a public nuisance, generally to be challenged by state or public authority, but that an abutter, when he sustains special and peculiar damage, and the grantee of a valid but not exclusive franchise, may in equity challenge and ultimately restrain such use. * * * Our own Supreme Court says in the *Tugwell* case that it is so because lawful business is entitled to protection against unlawful competition, which it occurs to us is a sufficient answer alone."

To the same effect, denying a trespasser the right to operate a public utility when challenged by the owner of a franchise to do so, the case of *Citizens Electric Illuminating Co. v. Lackawanna &c. Power Co.*, 255 Pa. 145, 99 Atl. 462, P. U. R. 1917E, 540, held that: "It is true that the complainant company has not an exclusive franchise for the township of Jenkins in the sense that the grant of a similar franchise to be exercised and enjoyed within the same territory would be void, but, having a franchise for the purpose of constructing and operating a plant to be used for the benefit of the public within said township, such franchise is, and ought to be, exclusive as against all others attempting to exercise such rights without legislative authority.

And that is this case. The appellant, as we have seen, is without legal authority in attempting to invade Jenkins township, and is therefore, in so doing, attempting an illegal act."

That a franchise of a municipality is not exclusive of itself unless expressly made so, although made expressly exclusive of "any other person or corporation" is clearly decided in the case of *Knoxville Water Co. v. Knoxville, Tennessee*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224, as follows: "The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it can not, consistently with the constitutional rights of the water company, establish and maintain, a separate system of waterworks of its own. * * * The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If, by contract or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings. Turning, now, to the agreement of 1882, we fail to find in it any words necessarily importing an obligation on the part of the city not to establish and maintain waterworks of its own during the term of the water company. * * * We are therefore constrained by the words of the agreement to hold that the city did not assume, by any contract protected by the Constitution of the United States, to restrict its right to have a system of waterworks, independent altogether of the system established and maintained by the water company. If this interpretation of the contract will bring hardship and loss to the water company, and to those having an interest in its property and bonds, the result (omitting now any consideration of the question of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do."

CHAPTER 10

CONTRACTS OF MUNICIPAL CORPORATIONS FOR PUBLIC UTILITY SERVICE

Section	Section
190. Power of municipal authorities to contract.	203. Impairment of franchise rights by competition not prohibited.
191. Contract for service not exclusive by implication.	204. Contract not exclusive to preserve competition.
192. Contracts—Competing public or privately-owned utilities.	205. Contract for division of territory among competitors void.
193. Wide discretion of municipal authorities.	206. Exclusiveness of franchise may be waived.
194. Exclusive contract for reasonable period.	207. Contract limiting service to exclude competition void.
195. Contracts with municipal and private parties distinguished.	208. Contract for unnecessary service unreasonable and invalid.
196. Power of municipality determined by necessity.	209. Perpetual contract void.
197. Exclusive contract formerly denied validity.	210. Contract tending to exclude municipality strictly construed.
198. Right to regulate rates to be conserved.	211. Municipality may exclude itself expressly.
199. Contract executed by municipality as business concern.	212. Municipality excluded by exclusive contract.
200. Contract for excessive period void.	213. Commission control.
201. Contract with duration not fixed is optional, not perpetual.	214. Paving under contract.
202. Municipal contract not exclusive unless expressly made so.	

§ 190. Power of municipal authorities to contract.—The municipal corporation acting under statutory authority may in contracting for the service of municipal public utilities for itself and its inhabitants exercise a wide discretion without objection or interference on the part of the court, unless fraud is found or the discretion is grossly abused by the terms of the contract being clearly unreasonable and inequitable. While municipal authorities are given power by implication to contract for the necessary service of public utilities beyond the term of their office and for a reasonable time under the circumstances of the particular case, because it is practically impossible to get such service to any advantage and at reasonable rates for very short

periods, what time is reasonable for such contracts is a question of fact to be determined in each particular case. Naturally no definite period of time can be fixed upon as a reasonable one for all cases. Where the maximum period provided in the statute is exceeded, or where the term fixed in the contract extends over so long a period of time as to result in the granting of an exclusive privilege to the extent of creating a monopoly and unduly interfering with the exercise of the legislative powers of municipal authorities, the contract will be held void and set aside as unreasonable and beyond the powers of the municipality to make.

Where the municipality has recognized the existence of a contract and accepted benefits under it, the city is bound to perform its obligations under the contract which was legally made, as a mere irregularity which did not go to its merits is not material, for as the court said in the case of *McKenzie Constr. Co. v. San Antonio* (Tex. Civ. App.), 50 S. W. (2d) 349: "Appellees' objection that no provision for interest and sinking fund was made at the time the contract was made can not be entertained. Neither the provisions of the city charter nor of the state constitution or statute were violated. *McNeal v. City of Waco*, 89 Tex. 88, 33 S. W. 322, 323; *Berlin Iron-Bridge Co. v. City of San Antonio* (Tex. Civ. App.), 50 S. W. 408. The contract involved in this case was within the corporate power of the city to make; it was not prohibited by law nor was it ultra vires or against public policy; it was entered into by ordinance as prescribed by the city charter; the most serious objection that could be lodged to it, if at all, is that there was a mere irregularity in the making of it. The city accepted the benefits of the contract. It repeatedly recognized the contract by ordinances appropriating specific sums of money to pay appellant as construction progressed; it specifically recognized it in its ordinance of December 8, 1926, accepting the roadway on the dam. Such acts bind the city to performance of its obligations under the contract by ratification."

§ 191. Contract for service not exclusive by implication.—The contract for such service will not by implication be construed as exclusive for the same reason that the power of the municipality in the first instance to grant a franchise, or the franchise when granted, will not be regarded as exclusive by implication. Nor will the making of such a contract by the municipal corporation in itself exclude the municipality from entering the field and maintaining municipal public utilities any

more than the granting of a franchise or the making of a contract restricts the municipality from making additional contracts with other corporations or granting similar franchise rights to them. The contract for public utility service is, of course, protected the same as any other contract, but the fact that the municipality has made a contract for a certain amount of service does not prevent it from entering into another agreement with a different company for additional or other service; although practically this of necessity has the effect of interfering with the business interests of the party to the first contract because in permitting and encouraging competitive conditions it diverts some of the business to the competitor. At present by virtue of the regulation of state commissions competition is frequently excluded under grants of "indeterminate permits."

§ 192. **Contracts—Competing public or privately-owned utilities.**—This loss of business, however, is not protected by the constitutional provision prohibiting the impairment of contracts any more than the granting of the franchise itself, which, as we have seen, can not be found to be exclusive unless made so expressly. And while the municipal public utility on securing a contract with the municipality for a certain amount of its service naturally anticipates that it will be permitted to render all the service that the municipality requires, the agreement does not prevent the city from contracting for additional service from other public utilities which may be installed later, thus securing to the city and its inhabitants the advantages of competition; nor does it restrain the city itself from owning and operating a competing public utility plant unless the contract or the franchise in the first instance was expressly made exclusive, or the state issues "indeterminate permits."

A municipal corporation having a contract for water service with a private company may install its own water system without objection from the private company where the contract was not exclusive and had no fixed time of duration, nor may the private company object to such action by the municipality on the ground that it is a taxpayer, because the contract for the municipal plant was payable only out of the savings or profits of its system and did not constitute a debt payable by funds raised through taxation. This principle is established and discussed as follows in the case of *Mississippi Valley Power Co. v. Board of Improvement of Waterworks Dist. No. 1 (Ark.)*, 46 S. W. (2d) 32: "The appellant company had no contract

with the waterworks district for furnishing power for any particular term or time, when it sought to enjoin the district from installing a power plant of its own, with which it could supply water to the district at a saving of about three cents per thousand gallons and from such savings pay for the installation of the new power plant in a period of seven years, leaving in the savings fund more than \$4,000, and no error was committed in dismissing the appellant's complaint for want of equity. Neither does appellant company have any standing as a taxpayer to resist or prevent the purchase of the new power plant by the appellee district. * * * This contention is not warranted, however, since the contract expressly provides that the purchase-price of the engines is to be paid for only out of the savings in the cost of pumping water. * * * The courts have held, however, that contracts of this character did not create debts within the purview of constitutional or statutory prohibitions against incurring debts, as the only recourse in the contract, which the selling company has in the case of the failure to pay the purchase-price, is to retake the machinery."

§ 193. **Wide discretion of municipal authorities.**—The determination of the question as to the nature and extent of the power and the discretion vested in municipalities permitting them to make contracts for the service of public utilities necessarily depends upon the legislative authority and so many varying circumstances and conditions of the municipality in question as to size, situation, cost of supply and future prospects that our courts will not interfere and set aside such contracts when made by municipalities in the exercise of their discretion, except in extreme cases of its abuse. As the circumstances attending the different cases are necessarily so varied and as the decision of the question is peculiar to the facts of each case, the following extracts from some of the leading cases are furnished to define and illustrate the application of this principle.

Where the municipal authorities act in good faith, the court will not disturb their judgment in contracting for the installation of a public utility plant on such terms and conditions as they regard most advantageous. This well-recognized principle is clearly enunciated in *Haralson v. Dallas* (Tex. Civ. App.), 14 S. W. (2d) 345, where the court said: "The city authorities were, under the law, charged with the duty of securing the kind and character of pipes and material best suited for this project, and, having acted in good faith, it is not for this court, or any

other court, to substitute its opinion for theirs in determining such a matter. * * * As heretofore shown, the specifications provided that, at the discretion of the governing authorities of the city, contracts could be let, either for the whole work or for any part thereof by lines as described, or by sizes of pipe specified for lines or parts of lines. * * * The governing authorities of the city, after canvassing the bids, decided that the one in question was the best and most advantageous, and accordingly awarded the contract for a complete or turnkey job. All contractors were invited to bid alike for a part or for the entire work, according to lines and sizes of pipe. There is no evidence of a lower bid, nor that any other bidder knew of or was controlled in any sense by the bid in question; hence it did not suppress competition, nor tend in the least to prevent any or as many as desired from bidding on a part or the whole job. The authorities having reserved the right to award contracts, either for the whole or part of the work, were, in our opinion, fully authorized to accept the bid in question."

A municipality is vested with a wide discretion as to the requirements it may impose upon public utilities where the public health is concerned as in the matter of securing a wholesome water supply, and the court will not interfere with a municipal provision requiring the installation of a filtration system which may entail a substantial expenditure of money. The court will presume that the action of the municipality in such a case is reasonable in the interest of the public health and that the expenditure of funds sufficient for the purpose is necessary, for as the court said in the case of *Philippi v. Tygarts Valley Water Co.*, 99 W. Va. 473, 129 S. E. 465: "But where the public interests are involved, the contract may be thus enforced. As long as a public service corporation maintains its franchise it must fulfil the obligations to the public directly or impliedly arising from the same. * * * A determination of the reasonableness of the ordinance depends upon its purpose, the condition it seeks to meet, and its character with respect to being confiscatory. Its purpose is the preservation of the public health. The condition it seeks to remedy is to prevent the health of the community being destroyed by delivery, under its franchise, from a public service corporation of unwholesome water. The petition alleges that the plan provided by ordinance will not require the expenditure of an unreasonable sum of money. * * * The city commands what it alleges to be a reasonable provision for the filtration of the water supplied the city by the water

company. Mandamus has been held to lie to compel a street railway company to replace its rails with rails of an improved pattern in pursuance of a city ordinance to that effect where such ordinance is reasonable. *Washington R. R. Co. v. Alexandria*, 98 Va. 344, 36 S. E. 385. * * * In view of the facts stated in the petition, which on demurrer are taken to be true, we will not assume that the city government, in the exercise of its legislative power, acted capriciously or without sufficient reason. The presumption of law is that it did not so act. We can not say that the ordinance is unreasonable."

In contracting for public utility service, the municipality has a wide discretion in all matters requiring the exercise of business judgment, which the courts will respect, especially where there is no evidence of bad faith in the transaction, for as the court said in the case of *Northern States Power Co. v. Granite Falls (Minn.)*, 242 N. W. 714: "Plaintiff was not given [the] right, and does not otherwise possess it, to use streets or alleys to furnish electric energy to inhabitants of the city or other customers outside it. The contract confers on plaintiff no right to deal with or serve the public. * * * Its expressed purpose is to reserve to the city the right to utilize its hydro plant. The two Diesel engines may be maintained, and possibly it is not going too far to say that it was contemplated that they would be maintained, for stand-by purposes, to be resorted to in case of breakdown or other interruption of the service looked for from the combination of the city turbine and plaintiff's plant. * * * With such contract terms and the imperious modern demand for continuous electric service, it is impossible to argue successfully that the contract is one for abandonment by the city of any part of its power plant. There is express agreement for continued use of its water power. As to its Diesel engines, it is sufficient that there is nothing requiring it to abandon either of them. That it has the option to dispose of or replace them is immaterial. It is enough that the contract does not require it, even by implication. The contract depends upon the continued maintenance and use and doubtless also upon the extension of the city's transmission lines."

Where the purpose of the contract is clearly municipal and the element of public convenience and necessity is apparent, the court will sustain a joint contract of city and state, especially where the benefits accruing to the city are clearly evident and in excess of their cost, where the state is cooperating with the city in constructing bridges and highways for the use of its in-

habitants and traveling guests. This principle was established and discussed as follows in the case of *Holton v. Seattle* (Wash.), 12 Pac. (2d) 754: "Two arguments on behalf of the appellant are made against the judgment. First, that it is beyond the power of the city of Seattle to enter jointly into a contract with the state for the doing of public work wherein the property of an individual is to be assessed for the benefits—that is, for the city and the state, on one side, to enter into a contract with another to do such work. * * * It has become common in expensive highway construction for the strong to assist the weak—the federal government helps the state, and the state helps the counties and cities. The appropriation acts and the contract involved in this case contain no suggestion or attempt at interfering with or limiting the jurisdiction and power of the cities with respect to the management and control of their streets, including these bridge approaches, and the fact that the state, as such, nominally becomes a party with the city, by which the contract for the construction is let to another, amounts to no more, under the circumstances of this case, than administrative cooperation in an important public work, the cost of which is met mostly by the state, and the remainder by the city and benefited property, whose owners are represented by the city. Such joining of the state with the city in making the contract does not question nor is it beyond the power of the city."

§ 194. **Exclusive contract for reasonable period.**—While from a few of the authorities it appears that some of our courts have held that the municipal corporation can not make an exclusive contract for public utility service even for a fixed period of years, which but for the exclusive feature would be generally regarded as a reasonable period to bind the municipality, the greater weight of authority, and it would seem the better reason, permits the municipality in the exercise of its discretion to make such terms for securing the services of municipal public utilities as seem wise and necessary at the time the contract is entered into. Necessity is regarded as the proper measure of the municipality's power and it is permitted to make such stipulations as to the duration of the contract and its exclusiveness as the municipality finds necessary or expedient to secure satisfactory service at reasonable rates; and to secure such service the municipality may, if necessary, agree that all such service shall be rendered only by the municipal public utility with which it is contracting, even to the exclusion of the municipality itself provided the duration of such a contract is not unreasonable.

§ 195. **Contracts with municipal and private parties distinguished.**—It is of course obvious that the enjoyment of an exclusive franchise or contract for the supply of public utility service by the municipality itself is always to be distinguished from the case where such a power is reposed in a private concern, for in the former case the franchise rights are exercised by the people and for their best interests and not for private gain or primarily for profit. The control of the service in the former case remains in the municipality which renders it to itself and its inhabitants for their mutual benefit and in the interest of the general welfare. Where such exclusive rights, however, are placed in the hands of private capital, whose chief purpose and ultimate object is the greatest possible return on the investment, the tendency is to operate primarily for profit and to disregard the interest and convenience of the public which can be properly conserved only by competition or public regulation and control.¹

¹ **United States.** New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; Hamilton Gaslight &c. Co. v. Hamilton, Ohio, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90; Walla Walla, Washington v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77; Bienville Water Supply Co. v. Mobile, Alabama, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. 40; Joplin, Missouri v. Southwest Missouri Light Co., 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. 43; Knoxville Water Co. v. Knoxville, Tennessee, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224; Vicksburg, Mississippi v. Vicksburg Waterworks Co., 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660, 6 Ann. Cas. 253; Columbus, Georgia v. Mercantile Trust &c. Co., 218 U. S. 645, 54 L. ed. 1191, 31 Sup. Ct. 105; Vicksburg, Mississippi v. Henson, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. 95; Milwaukee Elec. R. &c. Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, 59 L. ed. 1254, 35 Sup. Ct. 820; Detroit United Ry. v. Detroit, Michigan, 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. 87; Owensboro, Kentucky v. Owensboro Water Works Co., 243 U. S. 166, 61 L. ed. 650, 37 Sup. Ct. 322; Detroit United

R. Co. v. Detroit, Michigan, 248 U. S. 429, 63 L. ed. 341, 39 Sup. Ct. 151, P. U. R. 1919A, 929; Springfield Gas &c. Co. v. Springfield, Illinois, 257 U. S. 66, 66 L. ed. 131, 42 Sup. Ct. 24, P. U. R. 1922A, 576; Trenton, New Jersey v. State of New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. 534, 29 A. L. R. 1471; Newark, New Jersey v. State of New Jersey, 262 U. S. 192, 67 L. ed. 943, 43 Sup. Ct. 539; Joslin Mfg. Co. v. Providence, Rhode Island, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. 684; Superior Water, Light &c. Co. v. Superior, Wisconsin, 263 U. S. 125, 68 L. ed. 204, 44 Sup. Ct. 82; Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 73 L. ed. 653, 49 Sup. Ct. 282; Railroad Commission of California v. Los Angeles R. Corp., 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. 71; Broad River Power Co. v. State of South Carolina, 281 U. S. 537, 74 L. ed. 1023, 50 Sup. Ct. 401, P. U. R. 1930C, 234; Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 75 L. ed. 1112, 51 Sup. Ct. 476, P. U. R. 1931D, 221.

Federal. Saginaw Gaslight Co. v. Saginaw, Michigan, 28 Fed. 529; Defiance Water Co. v. Defiance, Ohio, 90 Fed. 753; Cunningham v. Cleveland, Tennessee, 98 Fed. 657; Little

Falls Elec. &c. Co. v. Little Falls, Minnesota, 102 Fed. 663; Tillamook Water Co. v. Tillamook City, Oregon, 139 Fed. 405, *affd.* in 150 Fed. 117; Meridian, Mississippi v. Farmers Loan &c. Co., 143 Fed. 67, 6 Ann. Cas. 599; Water, Light &c. Co. v. Hutchinson, Kansas, 144 Fed. 256, *affd.* in 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. 135; Risley v. Utica, 179 Fed. 875; Nelson v. Murfreesboro, Tennessee, 179 Fed. 905; Cumberland Gaslight Co. v. West Virginia &c. Gas Co., 188 Fed. 585; City Water Co. v. Chillicothe, Missouri, 207 Fed. 503, *cert. denied* in 231 U. S. 753, 58 L. ed. 467, 34 Sup. Ct. 322; Birmingham Waterworks Co. v. Birmingham, Alabama, 211 Fed. 497, *affd.* in 213 Fed. 450; Montana Water Co. v. Billings, Montana, 214 Fed. 121, *appeal dis.* in 224 Fed. 1021; Murray v. Pocatello, Idaho, 214 Fed. 214; Iowa Tel. Co. v. Keokuk, Iowa, 226 Fed. 82, P. U. R. 1916B, 41; California-Oregon Power Co. v. Medford, Oregon, 226 Fed. 957; Old Colony Trust Co. v. Tacoma, Washington, 230 Fed. 389; Omaha Gas Co. v. Omaha, Nebraska, 249 Fed. 350; La Follette, Tennessee v. La Follette Water, Light &c. Co., 252 Fed. 762; Columbus R., Power &c. Co. v. Columbus, Ohio, 253 Fed. 499, P. U. R. 1919B, 249, *affd.* in 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1648, P. U. R. 1919D, 239; Moorhead, Minnesota v. Union Light, Heat &c. Co., 255 Fed. 920; Shreveport, Louisiana v. Southwestern Gas &c. Co., 258 Fed. 59, P. U. R. 1920C, 775, *cert. denied* in 252 U. S. 585, 64 L. ed. 729, 40 Sup. Ct. 394; Hillsdale Gaslight Co. v. Hillsdale, Michigan, 258 Fed. 485, P. U. R. 1919F, 941; Knoxville Gas Co. v. Knoxville, Tennessee, 261 Fed. 283; Cudahy Packing Co. v. Omaha, Nebraska, 277 Fed. 49; Central Power Co. v. Central City, Nebraska, 282 Fed. 998; Denver, Colorado v. Stenger, 295 Fed. 809; New York & Queens Gas Co. v. Prendergast, 1 Fed. (2d) 351; Bronx Gas &c. Co. v. Prendergast, 1 Fed. (2d) 377; Jamestown, New York v. Pennsyl-

vania Gas Co., 1 Fed. (2d) 871; Tulsa, Oklahoma v. Oklahoma Nat. Gas Co., 4 Fed. (2d) 399, *dis.* in 269 U. S. 527, 70 L. ed. 395, 46 Sup. Ct. 17; Puget Sound Power &c. Co. v. Seattle, Washington, 5 Fed. (2d) 393; Seattle, Washington v. Puget Sound Power &c. Co., 15 Fed. (2d) 794; Oshkosh, Nebraska v. Fairbanks, Morse & Co., 8 Fed. (2d) 329; Landon v. Kansas City Gas Co., 10 Fed. (2d) 263; Swift v. Columbia R., Gas &c. Co., 17 Fed. (2d) 46, P. U. R. 1927C, 403; Idaho Power Co. v. Thompson, 19 Fed. (2d) 547, P. U. R. 1927D, 388; Cudahy Packing Co. v. Omaha, Nebraska, 24 Fed. (2d) 3; Empire Nat. Gas Co. v. Southwest Pipe Line Co., 25 Fed. (2d) 742; Oregon-Washington Water Service Co. v. Hoquiam, Washington, 28 Fed. (2d) 576; Puget Sound Power &c. Co. v. Seattle, Washington, 29 Fed. (2d) 254; Baton Rouge, Louisiana v. Baton Rouge Waterworks Co., 30 Fed. (2d) 895, P. U. R. 1929D, 316; Central Kentucky Nat. Gas Co. v. Mt. Sterling, Kentucky, 32 Fed. (2d) 338, P. U. R. 1929E, 446; Karel v. Eldorado, Illinois, 32 Fed. (2d) 795; Griffin v. Oklahoma Nat. Gas Corp., 37 Fed. (2d) 545; Oklahoma Nat. Gas Corp. v. Municipal Gas Co., 38 Fed. (2d) 444; McDowell v. Barberton, Ohio, 38 Fed. (2d) 786; Florida Power &c. Co. v. Atlantic Gulf &c. Co., 38 Fed. (2d) 948; Harris Trust &c. Bank v. Chicago R. Co., 39 Fed. (2d) 958; Chicago v. Harris Trust &c. Bank, 40 Fed. (2d) 612; Bridgeport Irr. Dist. v. United States, 40 Fed. (2d) 827; Todd v. Citizens Gas Co., 46 Fed. (2d) 855; Kentucky-Tennessee Light &c. Co. v. Paris, Tennessee, 48 Fed. (2d) 795; Campbell, Missouri v. Arkansas-Missouri Power Co., 55 Fed. (2d) 560; Hamill v. Hawks, 58 Fed. (2d) 41; Wilbur v. Burley Irr. Dist., 58 Fed. (2d) 871; Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2, 59 Fed. (2d) 19.

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Angeles v. Southgate (Cal.), 291 Pac. 654; Monrovia v. Southern Counties Gas Co. (Cal.), 296 Pac. 117; Henderson v. Oroville-Wyandotte Irr. Dist. (Cal.), 2 Pac. (2d) 803; Golden Gate Bridge & Co. Dist. v. Felt (Cal.), 5 Pac. (2d) 585; St. Helena v. Ewer, 26 Cal. App. 191, 146 Pac. 191; Los Angeles Gas & Co. v. Los Angeles, 52 Cal. App. 27, 197 Pac. 962, P. U. R. 1921E, 106, error dis. in 263 U. S. 724, 68 L. ed. 526, 44 Sup. Ct. 2; Newell v. Redondo Water Co., 55 Cal. App. 86, 202 Pac. 914; Hudson v. Ukiah Water & Co., 55 Cal. App. 709, 204 Pac. 862; Stratton v. Mountain View Water Co., 94 Cal. App. 188, 270 Pac. 1006; Merced Irrigation Dist. v. San Joaquin Light & Co. Corp., 101 Cal. App. 153, 281 Pac. 415; Garrett v. Swanton (Cal. App.), 3 Pac. (2d) 1025.

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160, 38 Am. Rep. 781; Georgia R. & Co. v. Railroad Commission, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1, P. U. R. 1919D, 546; Albany v. Georgia-Alabama Power Co., 152 Ga. 119, 108 S. E. 528; Young v. Moultrie, 163 Ga. 829, 137 S. E. 257; Georgia Power Co. v. Decatur, 168 Ga. 705, 149 S. E. 32, P. U. R. 1929C, 460, affd. in 281 U. S. 505, 74 L. ed. 999, 50 Sup. Ct. 422, P. U. R. 1930C, 241; Georgia Power Co. v. Decatur, 170 Ga. 699, 154 S. E. 268; Macon v. Georgia Power Co., 171 Ga. 40, 155 S. E. 34; Morton v. Waycross (Ga.), 160 S. E. 330; Gmann v. Coastal Public Service Co. (Ga. App.), 160 S. E. 807.

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N. E. 599; Indiana Service Corp. v. Warren (Ind. App.), 180 N. E. 14.

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1923C, 249; *Phillips v. Kentucky Utilities Co.*, 206 Ky. 151, 266 S. W. 1064; *Union Light, Heat & Co. v. Fort Thomas*, 215 Ky. 384, 285 S. W. 228, P. U. R. 1927A, 691; *Covington v. O. F. Moore Co.*, 218 Ky. 102, 290 S. W. 1066; *Cahill-Swift Mfg. Co. v. Bardwell*, 219 Ky. 649, 294 S. W. 171; *Jones v. Rutherford*, 225 Ky. 773, 10 S. W. (2d) 296; *Poggel v. Louisville R. Co.*, 225 Ky. 784, 10 S. W. (2d) 305; *Jones v. Corbin*, 227 Ky. 674, 13 S. W. (2d) 1013; *South Covington & Co. St. R. Co. v. Henkel*, 228 Ky. 271, 14 S. W. (2d) 1068; *Schoening v. Paducah Water Co.*, 230 Ky. 453, 19 S. W. (2d) 1073; *Board of Education v. Kentucky Utilities Co.*, 231 Ky. 484, 21 S. W. (2d) 817; *Russell v. Kentucky Utilities Co.*, 231 Ky. 820, 22 S. W. (2d) 289, P. U. R. 1930B, 400; *Sturgis v. Christenson Bros.*, 235 Ky. 346, 31 S. W. (2d) 386; *Kentucky Utilities Co. v. Paris*, 237 Ky. 488, 35 S. W. (2d) 873, P. U. R. 1931C, 124; *Campbellsville v. Taylor County Tel. Co. (Ky.)*, 18 S. W. (2d) 305, P. U. R. 1929D, 547; *Brumfield v. Consolidated Coach Corp. (Ky.)*, 40 S. W. (2d) 356.

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Maryland. *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am.

St. 424; *Hagerstown v. Hagerstown R. Co.*, 123 Md. 183, 91 Atl. 170, 7 A. L. R. 1239, Ann. Cas. 1916B, 1267; *Merryman v. Baltimore City*, 153 Md. 419, 138 Atl. 324, P. U. R. 1928B, 546; *Kelly v. Consolidated Gas, Elec. Light & Co. Co.*, 153 Md. 523, 138 Atl. 487.

Massachusetts. *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497, writ of error dis. in 207 U. S. 604, 52 L. ed. 360, 28 Sup. Ct. 253; *In re Opinion of the Justices*, 231 Mass. 603, 122 N. E. 763, P. U. R. 1919D, 612; *Oak Bluffs v. Cottage City Water Co.*, 235 Mass. 18, 126 N. E. 384; *Moody v. Weymouth (Mass.)*, 177 N. E. 80; *Salisbury v. Salisbury Water Supply Co. (Mass.)*, 181 N. E. 194.

Michigan. *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Cadillac v. Citizens Tel. Co.*, 195 Mich. 538, 161 N. W. 989, P. U. R. 1917E, 962; *Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998, P. U. R. 1918D, 41; *Iron Mountain v. Iron Mountain Waterworks*, 206 Mich. 537, 173 N. W. 612; *Saginaw v. Consumers Power Co.*, 213 Mich. 460, 182 N. W. 146, P. U. R. 1921E, 281; *Plainwell v. Easley Light & Co. Co.*, 214 Mich. 461, 183 N. W. 66.

Minnesota. *Flynn v. Little Falls Elec. & Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; *Crookston v. Crookston Water Works, Power & Co.*, 150 Minn. 347, 185 N. W. 380; *State v. Kilkenny*, 170 Minn. 424, 212 N. W. 899; *Duluth v. Duluth St. R. Co.*, 172 Minn. 187, 215 N. W. 69; *Guth v. Staples*, 183 Minn. 552, 237 N. W. 411; *Northern States Power Co. v. Granite Falls (Minn.)*, 242 N. W. 714.

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wood, 319 Mo. 562, 4 S. W. (2d) 773; Bell v. Fayette, 222 Mo. 184, 296 S. W. 1047; Bell v. Fayette (Mo.), 28 S. W. (2d) 356; Kansas City v. Kansas City Terminal R. Co., 324 Mo. 882, 25 S. W. (2d) 1055; Hight v. Harrisonville (Mo.), 41 S. W. (2d) 155; Mountain View v. Farmers Tel. Exchange Co. (Mo. App.), 224 S. W. 155, affd. in 294 Mo. 623, 243 S. W. 153.

Montana. Billings v. Public Service Comm., 67 Mont. 29, 214 Pac. 608, P. U. R. 1923E, 77; Livingston Waterworks Co. v. Livingston, 53 Mont. 1, 162 Pac. 381, L. R. A. 1917D, 1074.

Nebraska. Marquis v. Polk County Tel. Co., 100 Nebr. 140, 158 N. W. 927; University Place v. Lincoln Gas & Co., 109 Nebr. 370, 191 N. W. 432, P. U. R. 1923B, 789; John A. Creighton Real Estate Co. v. Omaha, 112 Nebr. 802, 201 N. W. 657, 204 N. W. 66; State v. Johnson, 117 Nebr. 301, 220 N. W. 273; Carr v. Fenstermacher, 119 Nebr. 172, 228 N. W. 114; Hevelone v. Beatrice, 120 Nebr. 648, 234 N. W. 791.

New Jersey. Public Service Gas Co. v. Newark, 86 N. J. Eq. 384, 98 Atl. 404, P. U. R. 1916F, 532; Kearny v. Bayonne, 90 N. J. Eq. 499, 107 Atl. 169, P. U. R. 1919E, 696; Federal Shipbuilding & Co. v. Bayonne, 102 N. J. Eq. 475, 141 Atl. 455; Millville Water Co. v. Millville, 86 N. J. L. 10, 90 Atl. 1097; Public Service Elec. Co. v. Board of Public Utility Comrs., 88 N. J. L. 603, 96 Atl. 1013; Hackensack Water Co. v. Ridgefield, 96 N. J. L. 526, 115 Atl. 399; Eastern New Jersey Power Co. v. Board of Public Utility Comrs. (N. J.), 140 Atl. 258; Jersey Central Power & Co. v. Spring Lake (N. J.), 140 Atl. 677; Chatham v. Board of Conservation & Development (N. J.), 147 Atl. 720; In re Harrison (N. J.), 151 Atl. 215.

New York. In re Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Central New York Tel. & T. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. 878; International R. Co. v.

Rann, 224 N. Y. 83, 120 N. E. 153, P. U. R. 1919B, 830; Walton Water Co. v. Village of Walton, 238 N. Y. 46, 143 N. E. 786, P. U. R. 1924D, 125, rearg. denied in 238 N. Y. 555, 144 N. E. 89; New York v. Interborough Rapid Transit Co., 232 App. Div. 233, 249 N. Y. S. 243, P. U. R. 1931E, 161, affd. in 257 N. Y. 20, 177 N. E. 295, P. U. R. 1931E, 278; Bradley v. Union, 164 App. Div. 565, 150 N. Y. S. 107; Kings County Lighting Co. v. New York, 176 App. Div. 175, 162 N. Y. S. 581, P. U. R. 1917F, 26; Waterloo Water Co. v. Waterloo (Sup.), 189 N. Y. S. 906, P. U. R. 1922E, 378; Waterloo Water Co. v. Waterloo, 200 App. Div. 718, 193 N. Y. S. 360; Salmon v. Rochester & Lake Ontario Water Co., 120 Misc. 131, 197 N. Y. S. 769.

North Carolina. Mabe v. Winston-Salem, 190 N. Car. 486, 130 S. E. 169; Edenton Ice & Co. v. Plymouth, 192 N. Car. 180, 134 S. E. 449; Holmes v. Fayetteville, 197 N. Car. 740, 150 S. E. 624, P. U. R. 1930A, 369.

North Dakota. Chrysler Light & Co. v. Belfield, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

Ohio. State v. Cincinnati Gas Light & Co., 18 Ohio 262; State v. Hamilton, 47 Ohio St. 52, 23 N. E. 935; Interurban R. & Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186, P. U. R. 1916F, 998; Federal Gas & Co. v. Columbus, 96 Ohio St. 530, 118 N. E. 103, P. U. R. 1918D, 68; Cleveland R. Co. v. Cleveland, 97 Ohio St. 122, 119 N. E. 202; Interurban R. & Co. v. Public Utilities Comm., 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696, P. U. R. 1919B, 212; Cincinnati v. Public Utilities Comm., 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705, P. U. R. 1919C, 119; Oak Harbor v. Public Utilities Comm., 99 Ohio St. 275, 124 N. E. 158, P. U. R. 1919F, 608; Ohio River Power Co. v. Steubenville, 99 Ohio St. 421, 124 N. E. 246, P. U. R. 1920D, 1034; Lima v. Public Utilities Comm., 100 Ohio St. 416, 126 N. E. 318, P. U. R. 1920C, 930; Phelps v. Logan Nat. Gas & Co.

Co., 101 Ohio St. 144, 128 N. E. 58, P. U. R. 1920F, 322; Link v. Public Utilities Comm., 102 Ohio St. 336, 131 N. E. 796, P. U. R. 1921E, 72; United Fuel Gas Co. v. Public Utilities Comm., 103 Ohio St. 168, 132 N. E. 845, P. U. R. 1922B, 88; Local Tel. Co. v. Cranberry Mutual Tel. Co., 102 Ohio St. 524, 133 N. E. 527, P. U. R. 1923A, 396; State v. Court of Appeals for Eighth District, 104 Ohio St. 96, 135 N. E. 377, P. U. R. 1923E, 270; Wyoming v. Ohio Trac. Co., 104 Ohio St. 325, 135 N. E. 675; Lima v. Public Utility Comm., 106 Ohio St. 379, 140 N. E. 147, P. U. R. 1923E, 577; United Fuel & Co. v. Irontown, 107 Ohio St. 173, 140 N. E. 884, P. U. R. 1924A, 801, 29 A. L. R. 342; Greenville v. Public Utilities Comm. (Ohio St.), 179 N. E. 131, P. U. R. 1932B, 273; Cleveland v. East Ohio Gas Co., 34 Ohio App. 97, 170 N. E. 586; Parks v. Cleveland R. Co., 38 Ohio App. 315, 176 N. E. 472, affd. in 124 Ohio St. 79, 177 N. E. 28.

Oklahoma. Mitchell v. Tulsa Water & Co., 21 Okla. 243, 95 Pac. 961; Bartlesville Water Co. v. Bartlesville, 48 Okla. 344, 150 Pac. 118; Fretz v. Edmond, 66 Okla. 262, 168 Pac. 800, L. R. A. 1918C, 405, P. U. R. 1918D, 381, P. U. R. 1918E, 466; Huffaker v. Fairfax, 115 Okla. 73, 242 Pac. 254; Beauchamp v. Hallett, 115 Okla. 27, 241 Pac. 161; Pawhuska v. Pawhuska Oil & Co., 118 Okla. 201, 248 Pac. 336; Western Oklahoma Gas & Co. v. Duncan, 120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277; Tulsa v. Oklahoma Nat. Gas Co., 123 Okla. 176, 252 Pac. 431; Ruth v. Oklahoma City, 143 Okla. 266, 287 Pac. 406; Maney v. Oklahoma City (Okla.), 300 Pac. 642.

Oregon. Newsom v. Rainier, 94 Ore. 199, 185 Pac. 296; Twohy Bros. Co. v. Ochoco Irr. Dist., 108 Ore. 1, 210 Pac. 872, 216 Pac. 189; Butler v. Ashland, 113 Ore. 174, 232 Pac. 655; Yamhill Elec. Co. v. McMinnville, 130 Ore. 309, 274 Pac. 118, 280 Pac. 504, P. U. R. 1929C, 346.

Pennsylvania. Huntingdon Borough v. Huntingdon Water Supply

Co., 258 Pa. 309, 101 Atl. 989, P. U. R. 1919A, 189; Central Iron & Co. v. Harrisburg, 271 Pa. 240, 114 Atl. 258, P. U. R. 1922D, 687; Collingdale v. Philadelphia Rapid Transit Co., 274 Pa. 124, 117 Atl. 909; Swarthmore v. Public Service Comm., 277 Pa. 472, 121 Atl. 488; White Haven v. Public Service Comm., 278 Pa. 420, 123 Atl. 772; Reigle v. Smith, 287 Pa. 30, 134 Atl. 380; Tyrone Gas & Co. v. Tyrone Borough, 299 Pa. 533, 149 Atl. 713, P. U. R. 1930D, 490; Wentz v. Philadelphia (Pa.), 151 Atl. 883.

South Carolina. Gwynn v. Citizens Tel. Co., 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. 819; Paris Mountain Water Co. v. Greenville, 110 S. Car. 36, 96 S. E. 545; McKiever v. Sumter, 137 S. Car. 266, 135 S. E. 60; Green v. Rock Hill, 149 S. Car. 234, 147 S. E. 346; Peeples v. South Carolina Power Co. (S. Car.), 164 S. E. 605.

South Dakota. Huron v. Dakota Central Tel. Co., 46 S. Dak. 452, 193 N. W. 673; Tubbs v. Custer City, 52 S. Dak. 458, 218 N. W. 599.

Tennessee. Memphis Gas Light Co. v. Memphis, 93 Tenn. 612, 30 S. W. 25; Bank of Commerce & Co. v. Memphis, 155 Tenn. 63, 290 S. W. 990; Lewis v. Nashville Gas & Co., 162 Tenn. 268, 40 S. W. (2d) 409.

Texas. Ennis Water Works v. Ennis, 105 Tex. 63, 144 S. W. 930; Vernon v. Montgomery (Tex.), 265 S. W. 188; Texas Elec. & Co. v. Vernon (Tex.), 265 S. W. 176; Andrus v. Crystal City (Tex.), 265 S. W. 550; Creager v. Hidalgo County Water Improvement Dist. No. 4, 283 S. W. 151; Griffith v. Sewell (Tex.), 287 S. W. 673; Ranger v. Hagaman (Tex.), 4 S. W. (2d) 597; Haralson v. Dallas (Tex.), 14 S. W. (2d) 345; Teague v. Sheffield (Tex.), 26 S. W. (2d) 417; Dallas R. & Co. v. Bankston (Tex.), 33 S. W. (2d) 500; Hudspeth County Conservation & Co. v. Spears (Tex.), 39 S. W. (2d) 94; Republic Production Co. v. Collins (Tex.), 41 S. W. (2d) 100; Telluride Power Co. v. Teague (Tex.

§ 196. Power of municipality determined by necessity.—The case of *Mercantile Trust & Deposit Co. v. Columbus, Georgia*, 161 Fed. 135, decided in 1908, furnishes a good general statement of the principle under discussion and indicates that the courts

Civ. App.), 240 S. W. 950; *Phillips v. Cameron County Water Improvement Dist. No. 2* (Tex. Civ. App.), 5 S. W. (2d) 557; *South Texas Public Service Co. v. John* (Tex. Civ. App.), 7 S. W. (2d) 942; *Tyrrell & Inv. Co. v. Highlands* (Tex. Civ. App.), 44 S. W. (2d) 1059; *McKenzie Constr. Co. v. San Antonio* (Tex. Civ. App.), 50 S. W. (2d) 349.

Utah. *Brummitt v. Ogden Water Works Co.*, 33 Utah 289, 93 Pac. 828; *Mt. Olivet Cemetery Assn. v. Salt Lake City*, 65 Utah 193, 235 Pac. 876; *Logan City v. Public Utilities Comm.*, 72 Utah 536, 271 Pac. 961, P. U. R. 1929A, 378; *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878.

Vermont. *Valcour v. Morrisville* (Vt.), 158 Atl. 83.

Virginia. *Lynchburg Trac. & Co. v. Lynchburg*, 142 Va. 255, 128 S. E. 606; *Chesapeake & Tel. Co. v. Wythe Mutual Tel. Co.*, 142 Va. 529, 129 S. E. 389; *Portsmouth v. Virginia R. & Power Co.*, 141 Va. 54, 126 S. E. 362; *Hampton v. Newport News & Hampton R., Gas & Co.*, 144 Va. 29, 131 S. E. 328; *Hampton v. Newport News & Hampton, R., Gas & Co.*, 144 Va. 24, 131 S. E. 330; *Virginia R. & Power Co. v. Norfolk*, 147 Va. 951, 133 S. E. 565; *Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 138 S. E. 503; *Cantrell v. Appalachian Power Co.*, 148 Va. 431, 139 S. E. 247; *Mt. Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355; *Roanoke R. & Elec. Co. v. Brown*, 155 Va. 259, 154 S. E. 526; *Ex parte Norfolk R. & Co. (Va.)*, 128 S. E. 602, P. U. R. 1926A, 98.

Washington. *State v. Collins*, 93 Wash. 614, 161 Pac. 467; *Seattle v. Puget Sound Trac., Light & Co.*, 103 Wash. 41, 174 Pac. 464; *Cavers v. Home Tel. & T. Co.*, 117 Wash.

299, 201 Pac. 20, P. U. R. 1922A, 358; *Sunset Shingle Co. v. Northwestern Elec. & Co.*, 118 Wash. 416, 203 Pac. 978, P. U. R. 1924A, 506; *Hayes v. Seattle*, 120 Wash. 372, 207 Pac. 607; *Puget Sound Power & Co. v. Seattle*, 142 Wash. 580, 253 Pac. 1083; *Friese v. Edmonds*, 158 Wash. 316, 290 Pac. 856; *Burkheimer v. Seattle* (Wash.), 299 Pac. 381; *Blade v. LaConner* (Wash.), 9 Pac. (2d) 381.

West Virginia. *Charleston v. Public Service Comm.*, 86 W. Va. 536, 103 S. E. 673, P. U. R. 1920F, 823; *Philippi v. Tygarts Valley Water Co.*, 99 W. Va. 473, 129 S. E. 465; *Godfrey L. Cabot, Inc. v. Clarksburg Light & Co.*, 102 W. Va. 572, 135 S. E. 666.

Wisconsin. *Neacy v. Milwaukee*, 151 Wis. 504, 139 N. W. 409; *Madison v. Southern Wisconsin R. Co.*, 156 Wis. 352, 146 N. W. 492, 10 A. L. R. 910; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819; *Eau Claire Dells Improvement Co. v. Eau Claire*, 172 Wis. 240, 179 N. W. 2; *West Allis v. Milwaukee*, 180 Wis. 512, 193 N. W. 360; *Highway Trailers Co. v. Janesville Elec. Co.*, 187 Wis. 161, 204 N. W. 773; *Central Wisconsin Power Co. v. Wisconsin Trac., Light, Heat & Co.*, 190 Wis. 557, 209 N. W. 755, P. U. R. 1927A, 76; *Chicago, St. Paul, Minneapolis & C. R. Co. v. Black River Falls*, 193 Wis. 579, 214 N. W. 451; *J. Greensbaum Tanning Co. v. Railroad Commission*, 194 Wis. 634, 217 N. W. 282; *Wisconsin Gas & Co. v. Railroad Commission*, 198 Wis. 13, 222 N. W. 783; *Madison v. Railroad Commission*, 199 Wis. 571, 227 N. W. 10, P. U. R. 1930A, 499.

Wyoming. *Seaman v. Big Horn Canal Assn.*, 29 Wyo. 391, 213 Pac. 938.

are inclined to find in municipalities whatever power is necessary to enable them to contract for their public utility service to the best advantage. In the course of its decision the court said: "Assuming, as I have, that the city had authority, under the general welfare clause in its charter, to enter into this contract, and that it did not, as the decisions stood at the time the contract was made, create a debt in violation of the constitution of the state, there is nothing, so far as I have been able to see, and certainly nothing has been brought to the attention of the court, under the statutes and decisions of this state which would prevent the city of Columbus from making an exclusive contract for a limited period, if that contract was a necessary and indispensable incident to the contract for a supply of water. That such a grant of an exclusive privilege was necessary and indispensable to the main undertaking of the city seems to me to be beyond question. Considering the size of the city of Columbus at the time this contract was entered into, and the number of its inhabitants, it would have been an impossibility to have had any one enter into a contract of this sort, if the parties so contracting were to be met immediately, or soon thereafter, with competition from another waterworks company, or from the city itself engaging in the business of supplying water to the city and its inhabitants. Such a contract would have been utterly valueless, and no one would have undertaken the expenditure necessary for the establishment of such a system of waterworks as was contemplated by this contract, and was actually established, unless they had been guarantied an exclusive right for some reasonable period at least for rendering the service and receiving the return expressed in the contract. Competition from other parties, or from the city, would, of course, have destroyed the entire value of the outlay. It is clear that responsible parties would not have entered into any such contract except for its exclusive character."

On appeal to the Supreme Court of the United States this case as to the capacity of the municipality to contract was sustained in the case of *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 54 L. ed. 1193, 31 Sup. Ct. 105, where this court also said: "There remains, then, the simple question as to whether the circuit court was justified, upon a finding that the water company had not and was not able to do what it agreed to do, in restraining the city from meeting the plain necessities of the case by constructing and operating its own plant, because the city would not accept as a condition the pur-

chase at a price fixed by the court of so much of the waterworks plant as the court should be of opinion it could use in its own system. If, as is manifestly the case, the waterworks company has not complied with its contract in vital particulars, the city had the legal right to say, as it did in substance say, 'You have failed to maintain a continuous and adequate supply of water fit for domestic purposes, as you were bound to do. Public considerations of the highest obligation require that the city and its inhabitants shall have a continuous water service adequate to the preservation of the public health and the public safety. We therefore shall treat the contract as at an end, and undertake this function by means of a municipal plant.' However serious the result to the water company or its creditors, the plain law of the case was with the city. * * * The city should be left its freedom of contract in respect to buying such parts of the company's plant as it can profitably use. The remedy by an action for damages was wholly inadequate to the city. The city had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission."

While a municipality is allowed wide discretion in its contracts for service, it is also bound to exercise care, commensurate with its duties in rendering the service, which includes the taking of all proper precautions for supplying wholesome water to its inhabitants, for as the court said in the case of *Pennsylvania R. Co. v. Lincoln Trust Co.* (Ill.), 167 N. E. 721: "The city, having permitted the railroad company to connect its water main with the water main of the city, was in duty bound to exercise reasonable care to see that no polluted and impure water, dangerous to health, was allowed to enter into its mains through the water main of the railroad. The quantum of care and vigilance necessary to constitute ordinary prudence has relation to the importance of the subject-matter and is commensurate with the duty to be performed. When a city or other public utility assumes that which is practically an exclusive right, i. e., to provide a community with such a prime necessity of life as water, sound public policy requires that it faithfully perform its duty by furnishing a supply adequate in quantity and wholesome in quality. From the very nature of things, the consumer must rely on the proffered supply."

Where a municipality is under contract with its bondholders to use a fund, which it held as trustee, for the payment of its bonds, the city is not authorized to loan or invest such fund even at a higher rate of interest, because such a withdrawal and in-

vestment might result in its loss and would be in violation of the trust agreement, for as the court said in the case of *Bank of Commerce & Trust Co. v. Memphis*, 155 Tenn. 63, 290 S. W. 990: "Under the terms of the contract, the city can only draw upon this fund in the hands of the trustee 'for the use and benefit of the said water plant property,' 'or for the payment of the bonds and coupons hereby secured.' We can not agree that the withdrawal of a portion of this fund and a loan thereof to other banks or an investment thereof, even though a higher rate of interest upon the fund is thereby obtained, is an application of the fund to the use and benefit of the water plant property. Such an arrangement might profit the city or the board of water commissioners, but it would be of remote benefit, if any at all, to the water plant property. Such an arrangement might result in the loss of the portion of the fund withdrawn. At any rate the terms of the trust deed forbid such an arrangement and the trustee is within its rights in opposing the same. Whether or not any bondholder will be prejudiced by the plan the city contemplates is not a question now before us. It certainly does not appear that any bondholder will be prejudiced by compliance with the terms of the trust deed, and the trustee representing the bondholders is entitled to stand on the contract under such circumstances as are so far disclosed."

A municipality, however, may, in the course of enlarging its plant, combine its water and light systems in the interest of economy, without interference by the court at the instigation of a competing company, on the theory that the municipality is diverting its special funds to its permanent improvement fund as the means of paying for the combined and enlarged plant, which was operating profitably. This principle is clearly established as follows in the case of *Texas Electric & Ice Co. v. Vernon* (Tex.), 265 S. W. 176: "The specific basis for this proposition is that it appears that the city had expended about \$90,000 in the erection of a water and light plant, having gone largely in debt, illegally appellant asserts, for such purposes, and having illegally, it is alleged, diverted special funds to the permanent improvement fund for the purpose of paying on this project; that such project is not complete; and that defendants, unless enjoined, will continue to incur illegal indebtedness and make illegal transfers of special funds in order to complete the work. The evidence does show the expenditure of the sum of about \$90,000 for the purpose stated. \$40,000 of this amount was covered by refunding warrants which appellant asserts created an

illegal debt. * * * The lighting plant was in operation, but other improvements and extensions were in contemplation. The evidence is not, however, definite as to the amount of money that would be necessary to make these improvements and extensions. * * * Evidence was introduced to the effect that the lighting system is operated in connection with the water-works system which the city was operating before it installed the light feature; that it can operate the two systems in conjunction more economically than either one could be operated alone; and that such operation is producing a profit. * * * The evidence, as already stated, tends to show that the operation of the plant is producing a profit instead of a loss. Whatever may be the correct construction of the language of the ordinance quoted and the resultant rights of the parties thereunder, if the allegations of the petition be true, the evidence presents no case for injunction on this ground."

For the sake of the economy of the arrangement, the court will permit a combined improvement and assessment for paying the same by one authority and one improvement district, for as the court said in the case of *McCoy v. Holman*, 173 Ark. 592, 292 S. W. 999: "In the instant case, each of these separate improvements are but a combination and parts of an entire improvement, which can be provided in the organization of one district and without necessity for or regard to a separate assessment of benefits for each one of the parts of said improvements, even though the distinct parts of the improvements confer benefits of different kinds upon the property of the district. They each alike confer similar and identical benefits on the property in the district, and there is no good reason why they might not be constructed more economically and to the advantage of the property owners of the district by one board as a combined and single improvement, than by three boards of commissioners constructing one such improvement for the same territory under three separate improvement districts."

Under the doctrine of liberal construction of the powers of a municipal corporation to own and operate public utilities, it may contract for equipment to be paid for out of the profits of the public utility and reserve the title in the seller until paid for, as the court said in the case of *Johnston v. Stuart* (Iowa), 226 N. W. 164: "It is conceded that, if appellee city of Stuart has not already exceeded its constitutional limit of indebtedness, the present contract, if it constitutes a general obligation of the city, will carry its indebtedness beyond that limit. * * *

The proposal in this case is to pay for the machinery and equipment out of the net annual income from the operation of the electric light and water plants. * * * No portion of the purchase-price of the machinery is to be paid out of money derived from any form of taxation. * * * The business of owning and operating electric light, water and other power plants by municipalities is proprietary in character, and the income derived therefrom is used to defray operating expenses, and for other purposes not necessary to be stated. The authority of municipalities in the conduct and management of their proprietary business and to make contracts in pursuance thereof has been given a liberal construction. * * * Title to the machinery was reserved in the seller until paid for, but the purchase-price is not, and by the terms of the arrangement can not become, a general obligation of the municipality. This being true, the provision of the constitution limiting the power of municipalities to incur indebtedness was not violated. * * * The statute carries the implied authority at least to provide repairs, equipment, and replacements where reasonably needed. Finally, we conclude that the contract in question is not void upon any of the grounds urged by appellant, and the carrying out by the appellee can not, therefore, be enjoined."

Where payment for additional necessary equipment for its utility plant is to be made from the profits of the plant, the municipality may not be prevented from doing so at the instigation of a resident or taxpayer, because he is not a party in interest, for as the court said in the case of *Carr v. Fenstermacher*, 119 Nebr. 172, 228 N. W. 114: "The city was operating an electric light and power plant at the time the Diesel engine was purchased. * * * The seller of the new equipment and the holders of conditional warrants are limited to collection of deferred payments out of net earnings of the plant. By the very terms of the contract of sale individual property owned by residents of Sargent can not be taxed to pay any part of the purchase-price. The evidence shows that the new equipment was needed to make the plant efficient. There is nothing in the record to show extravagance, fraud or official corruption in the municipal proceedings. Performance of the contract according to its terms will not result in the taxation of any property owned by plaintiffs. The city had power in some form to make the purchase. The method adopted was not specifically prohibited by law and does not seem to be illegal. The power to pay for

or improve a lighting utility with available money on hand or with net earnings of the plant is implied by the general grant."

In the absence of express statutory authority, a municipality can not issue bonds for making extensions and improvements to its public utility plant on the theory that it is an original enterprise, for as the court said in the case of *Muscatine Lighting Co. v. Muscatine*, 205 Iowa 82, 217 N. W. 468: "We may say in the first place there is good reason for differentiating, as these sections do, establishment and construction of heating, water, gas, and electric plants from maintenance and from operation and from extensions and improvements thereof. The establishment and construction of such a plant is not the exercise of those municipal functions which are in their very nature governmental, but the exercise of those which are corporate and proprietary.

* * * As a general proposition a municipality ought not to operate utilities at the expense of taxpayers any more than a private corporation ought to operate them at a loss to its stockholders. They should be made to pay their own way, and the taxpayers ought not to be called upon to assume a burden that was never intended by the establishment. * * * After the plant is once established and constructed, or (in the case of a purchased plant) completed and the designed extensions and improvements made, the plant must thereafter be made to sustain and (if to be enlarged or extended) to pay for its own enlargement and extension. This interpretation is borne out by the terms of the authority given to cities and towns to levy taxes. * * * We are of the opinion that the proposed new boiler, generator, and switchboard constitute merely an extension or enlargement of a completed and existing plant and are not a part of the 'establishing' authorized and undertaken in 1922 within the meaning of section 722, Code Supplement 1913. It is the settled law of this jurisdiction that authority for the issuance of negotiable bonds by a municipality must be found in express language of statute. Such power can not be implied.

* * * It is quite plain that the legislature did not thereby confer power to issue bonds for making extensions and improvements of a plant erected by the municipality as an original enterprise, nor has it by the later enactments (Code 1924, section 6788 et seq., and sections therein referred to) granted such power."

In determining the nature of the service required in any particular case, the proper test is the use which will be made of it, and where, in the case of a water service, this use is domestic

in its nature, the water supply must be proper for that purpose although it may also be used for industrial purposes, as is indicated in the case of *Pejepscot Paper Co. v. Lisbon*, 127 Maine 161, 142 Atl. 194, for as the court said: "The fact that the building to which water is supplied is used for industrial purposes is not the criterion by which to determine whether the water supplied is used for domestic purposes. The test is an intended use which in its nature is domestic. * * * Water supplied to a factory for the mere personal convenience of men employed in the factory is supplied for domestic purposes, and not for any trade purpose at all. * * * The water furnished by the plaintiff to the defendant's restrooms, for the personal convenience of the employees of the plant, was for uses domestic in nature."

That the municipality should have a wide discretion in the exercise of its power to contract for public utility service in order to secure the most favorable terms, which depend largely upon the length of the contract, is well illustrated in the case of *Eastern New Jersey Power Co. v. Board of Public Utility Comrs. (N. J.)*, 140 Atl. 258, where the court said: "The service to be rendered by each of the companies is to be adequate service for the best interest of the public. Whether or not this service is adequately performed for the benefit of the public, by competing lighting companies, is a question pre-eminently for the board to determine. The board has full power, when the circumstances require it, to direct the manner in which the service owing to the public from each utility company is to be performed. While the streets of the borough may be incidentally affected by the erection of poles, stringing of wires, or otherwise, in furnishing electric lighting, the creation of such a condition does not seem to us to be in conflict with any right of the borough in the control of its highways. * * * It seems to us, therefore that the board, in making the order in question here, was acting fully within the powers conferred upon it by the law-making power of this state. * * * It is manifest that an electric light company which undertakes to furnish a municipality with lighting its streets or public buildings and enters into a contract with such municipality, for either a short or long term of years to that end, necessarily takes into consideration the cost of furnishing adequate equipment for the purpose designed, and that a time will come when the term of the contract will expire and the municipality may not see fit to renew the contract. It undoubtedly took into consideration the cost of its equipment and

the fact that it may fall into disuse by failure of the borough to renew the contract. It very likely took into consideration all these matters in fixing the rate to be charged for furnishing electricity for lighting the streets of the borough."

Where there is a contract between two public utilities by which the one has the right to its necessary supplies, the court will enforce the contract specifically according to its terms, so that the customers may be served and the public utility protected, since it had made large expenditures for the purpose of utilizing the product which it had secured from the other by contract, for as the court said in the case of *Empire Natural Gas Co. v. Southwest Pipe Line Co.*, 25 Fed. (2d) 742: "From a careful consideration of the authorities, it appears the right granted by the contract to lay pipe lines upon the leased premises and to build compressor stations to assist in receiving and marketing of the gas, creates such an interest in realty, or imposes such burden upon the leasehold estate during its term, as to create a right running with the land during the term of the leasehold estate. * * * It is clear the contract granted to the vendee such an easement in the leasehold estate as to bring it within the statutory definition of realty, and is binding upon the assignee of the leasehold estate chargeable with notice of its existence on the date of its purchase. However, irrespective of any privity of estate at law, the covenants are such as may be enforced in equity as against the assignee of the property, where the stipulations are such that for a breach thereof there exists no basis upon which to estimate damages. * * *

It seems reasonable that the defendant purchased the leasehold estate with notice of the existence of the contract for the sale of the gas. There was located on the premises a meter house, pipe lines, heaters, pinch gates, gas regulators, and meters. The gas from the wells flowed through the meter and was read once a day by an employee of the plaintiff. It is a matter of common knowledge that purchasers of oil and gas properties invariably ascertain the amount of production on producing properties, and one of the most satisfactory means of obtaining this information is to ascertain what the sales are and to whom the sales are made. It is clear from the evidence introduced in the trial of this cause that the plaintiff has expended over \$100,000 in the way of pipe lines and equipment for the purpose of utilizing this gas in supplying its numerous customers situated along its system of distribution, and that the gas supply from the leasehold estate is of peculiar value to it. * * * Where the

subject of the contract is obtainable at great expense, or great loss may be involved, the contract should be enforced. * * * Where a purchaser has an established business, the contract by which the seller agrees to furnish the buyer with such supplies as may be needed by the buyer during a specific period is not lacking in mutuality. It will be assumed the parties contracted with reference to the knowledge which they then had upon the subject."

Where, in purchasing a public utility plant, the municipality undertakes to pay out of the gross revenue from the operation of the plant annual payments of principal and interest of the bonds outstanding against the company, the city, after doing this, is then free to dispose of the balance of the revenue from the plant at its discretion, for as the court said in the case of Puget Sound Power & Light Co. v. Seattle, 29 Fed. (2d) 254: "This suit is one of the many phases of litigation arising out of the construction of the ordinances and contracts pertaining to the purchase and sale of the municipal street railway in Seattle. Reference to the transaction and to many of the controversies in the federal and state courts will be found in City of Seattle v. Puget Sound Power & Light Co. (C. C. A.), 15 Fed. (2d) 794. * * * The bonds and ordinance provide that the bonds are payable only out of the special fund, and that the city obligates itself to pay into such special fund out of the gross revenues of such municipal street railway system certain fixed amounts equal to the semiannual instalment of interest and the annual instalments of principal of the bonds until March 1, 1939, at which time all of such bonds, with interest, shall be fully paid, and such fixed amounts out of gross revenues are pledged to such semiannual payments of interest and annual payments of principal, and such annual payments shall constitute a charge upon such gross revenues superior to all charges whatever, including charges for maintenance and operation. * * * Stated in the briefest way, the argument of the company is that fixed amounts of gross revenue are pledged to the payment of the bonds of the plaintiff and constitute a trust fund of which the city is trustee, and for which it is liable for diversions said to have been already made, and that the city is subject to be enjoined to prevent diversions which there is danger it will make in the future. * * * In our opinion, plaintiff has failed to show itself entitled to relief. By section five of the ordinance, authorizing the bonds and the acquisition of the street railway system, the city obligated itself

to pay into the special fund out of the gross revenue of the railway system, one calendar month prior to the due date of any instalment of principal or interest, sufficient sums to meet such instalments, and to pay such instalments when due. *City of Seattle v. Puget Sound Power & Light Co. (C. C. A.)*, 284 Fed. 659. Section 4 of Ordinance 39069, authorizing the execution of the purchase-contract, provided that forthwith, upon delivery of the deed and bill of sale to the city by the company, the city could enter into possession of the property and operate the same, and could receive all of the revenue 'arising therefrom with no obligation whatever to account to the company for the same or any part thereof, save and except to provide therefrom for the payment of the interest and principal of the utility bonds authorized by Ordinance 39025, as therein provided, subject to the terms and conditions of this agreement.' Inasmuch as it appears that the city has paid into the special fund one calendar month prior to due dates sufficient sums to meet the maturing payments, the question narrows to determining whether the bonds operate to create a lien in gross upon all of the revenues of the railway system, and whether all of such revenues must be set aside as received and held inviolate until all of the bonds held by plaintiff are paid. There is no allegation that there is a failure with respect to the payment due March 1, 1927, or that moneys of the requisite amount from some source were not seasonably paid into the special fund, but it does appear that all obligations maturing on that date were promptly paid. In the absence of a clear showing of fact, it is not for the court to draw an inference that the payment made on March 1, 1927, came from any source other than the street railway revenues."

§ 197. **Exclusive contract formerly denied validity.**—The early decision of the case of *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio 262, decided in 1868, in denying the power of the city to make an exclusive contract for service for a period of twenty-five years no longer represents the weight of authority although the decision is expressly put on the ground which still obtains that necessity is the test of the extent of the power which the city may exercise in the making of such contracts. In the course of its decision the court said: "The authority to make the contract must therefore be found, if at all, in the general grant of power to cause the city to be lighted with oil or gas. This power carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the power expressly granted; hence we see no reason

to doubt that the city council might, by contract, provide for the lighting of the city by gas; and as the use of the streets and alleys for the purpose of laying gas pipes therein would be almost if not wholly indispensable to such an undertaking, it would clearly be competent for the city council to grant to the contracting party the right to such use. But no such necessity is perceived for making such right exclusive."

The case of *Nelson v. Murfreesboro*, Tennessee, 179 Fed. 905, decided in 1909 that under the power to make contracts for public lighting the city could not grant exclusive franchises for all service although it might believe such to be necessary in order to secure a contract advantageous to itself and its citizens, for as the court said: "It is obvious that if the city council, as an incident to its express power to make a contract for lighting the streets of the city, could incorporate as a term of the contract an exclusive franchise for furnishing gas and electricity for heat, light, and power to the inhabitants of the city, because it believed this to be necessary and proper in order to obtain a satisfactory contract for lighting the streets, it could likewise, by parity of reasoning, give, as a part of the consideration, an exclusive franchise for a waterworks or for a street railway system, or incorporate into the contract for street lighting any other exclusive franchise of a public character which it might deem necessary and proper in order to obtain a satisfactory contract for street lighting."

§ 198. Right to regulate rates to be conserved.—The case of *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. 828, decided in 1908, indicates that while the city may contract for its entire service for the period of fifty years it can not bind itself as to the rates to be paid for such service during the entire period, as this right to exercise the legislative authority in question can not be surrendered to this extent, but must remain in the municipality to be exercised whenever the interest of the city requires, for as the court said: "It is elementary that, unless such right is expressly made exclusive, it is not to be construed so, except by unavoidable implication arising from the terms used in the grant. As is well expressed sometimes, if it is in doubt, the grant fails. If we assume, however, that the city agreed to purchase all the water used by it from the company for the full term of fifty years, it must still be conceded that in so doing it contravened no positive statute of this state. * * * Municipalities in this state, therefore, can not enter into binding contracts with regard to the rates for service rendered to the

public. The right to regulate and fix rates can not be surrendered, and the duty to exercise the right, whenever the rates are, or become, excessive, can be enforced at any time. The attempt to suspend the right by an ordinance in no way affected the city, and conferred no right upon the company."

This principle is reaffirmed¹ in the case of *Alaska Electric Light & Power Co. v. Juneau, Alaska*, 294 Fed. 364, where the court denied the right of the city to bind itself by a fixed schedule of rates in the absence of express legislative power to that effect. In the course of its opinion the court said: "But this is far from saying that there is necessarily included, in the power to provide lights for a city, the power to enter into a binding contract whereby the rates to be charged by a public utility corporation shall be irrevocably fixed. The existence of such a right to establish fixed rates for a definite period depends upon the question whether or not the police power of the state has been delegated to the municipal corporation. * * * We may follow the conclusion which the court reached in that case, and say that the appellant here has failed to show that in 1908 the city had legislative authority to make a contract fixing rates for a definite period of time, so as to preclude its power to alter the same."

This principle and the reason on which it is based are aptly stated in the well-reasoned decision of the case of *Ansonia v. Ansonia Water Co.*, 101 Conn. 151, 125 Atl. 474, as follows: "The Supreme Court of the United States has often held that the rightful exercise of the power of the state to regulate rates charged by public service corporations can not be forestalled by contracts between such corporations and their customers, attempting to fix rates in advance for a term of years. * * * Examination of the authorities referred to, so far as they are relevant, shows that the exception is narrowly confined to cases in which it clearly and unmistakably appears, first, that the state has delegated its rate-regulating power to the municipality, acting within its geographical limits, and, second, that the municipality has with equal clarity and certainty exercised its delegated power by a contract fixing the rate to be charged for a limited term. * * * The second class includes the so-called 'franchise contract' cases, in which the municipality, being explicitly authorized to grant franchises conferring upon persons or associations the right to use its streets for laying water pipes, gas pipes or street railway tracks, has by ordinance, accepted by and acted upon by a public service corporation, and so having the

force and effect of a contract, granted a franchise specifying the maximum rates to be charged for the service to be rendered for a given term. * * * These cases illustrate the solicitude with which the Supreme Court resolves all doubtful cases in favor of the continuance of the rate-regulating power. * * * The root of the matter is that the rate-regulating power of the state is a limitation on the right to fix rates by private contract, and that therefore the rightful exercise of that governmental power can not be said to impair the obligation of such contracts."

The power to fix rates will be conserved and so will not be implied in municipalities which are merely agents of the state. As the court held in the case of *Winfield v. Public Service Comm.*, 187 Ind. 53, 118 N. E. 531, P. U. R. 1918B, 747: "Therefore the municipality, so far as affects the public welfare, acts, in granting franchises to public service corporations as the agent of the state, and can not bind the state beyond the authority delegated by the state to the municipality in that respect. The limitations of authority in the agent are known to all because they are reservations by virtue of the state's police power. * * * The state may also authorize municipalities to grant, in a franchise to a public service corporation, freedom from the exercise of the state's power of regulation; but such franchise is never construed to have this effect, unless the state's grant of authority to the municipality and the municipality's grant in the franchise are expressed in terms positive and clear. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *Milwaukee El. &c. Co. v. Commission*, 238 U. S. 174, 38 Sup. Ct. 820, 59 L. ed. 1254. * * * We hold, therefore, that, in so far as the public interests are involved, nothing in the charter of the defendant telephone company, nothing in the powers granted to the city, and nothing in the franchise contract between the city and the defendant telephone company prevents the state from regulating rates, including the matter of compensation to the city."

The power of the municipality to regulate does not include the power to fix rates definitely for the contract period as is clearly stated in the case of *Oak Bluffs v. Cottage City Water Co.*, 235 Mass. 18, 126 N. E. 384: "The chief question to be determined is whether the contract of 1910, according to the correct construction of its terms, purports to fix definitely the rates for domestic consumption for a period of twenty years, unless changed by agreement with the town. The only part of the con-

tract which purports to establish rates for domestic consumption is paragraph 13 quoted above. It is to be noted that there is nothing in that paragraph which by fair intendment fixed rates for any indefinite period of time. The obligation of the water company therein stated is to 'revise its rates' so that the prices shall conform to the schedule annexed. Instead of saying that the prices so fixed shall be permanent or shall continue for the term of the contract, they are expressly made 'subject to such reasonable additions thereto and amendments and modifications thereof from time to time as shall be found proper and expedient, and the laws of the Commonwealth may permit or require.' This modifying clause applies to all the preceding part of the paragraph. * * * The meaning of the contract is that the rates and prices to be charged to the domestic consumers for water was not fixed by the contract rigidly for the entire term of twenty years from 1910, but without infraction of its terms it is open for the water company to attempt to secure under its charter rights as modified by general law a fair return for the service rendered by it to its domestic and other private consumers and customers, which alone is the avowed purpose of the increases made in 1918 and 1919. See *Donham v. Public Service Commissioners*, 232 Mass. 309-317, 122 N. E. 397."

As a condition of granting its local consent the municipality may exercise the power of rate regulation even as a customer for as the court said in the case of *Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998, P. U. R. 1918D, 41: "Nor are we able to follow counsel in his contention that the city of Kalamazoo was incapacitated from fixing gas rates because of the fact that the city was a user of gas, and therefore could not, as such purchaser, fix the price to itself and its inhabitants, as was held in *Cleveland Gaslight & Coke Co. v. City of Cleveland* (C. C.), 71 Fed. 610, and *Agua Pura Co. v. Las Vegas*, 10 N. M. 6, 60 Pac. 208, 50 L. R. A. 224. The decisions of the United States Supreme Court, holding the contrary doctrine (*Spring Valley Water Works v. Schottler*, 110 U. S. 347, 353, 4 Sup. Ct. 48, 28 L. ed. 173, and *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 279, 29 Sup. Ct. 50, 53 L. ed. 176) are persuasive to us that this point is not well taken. See, also, section 509, Pond on Public Utilities. This brings us to the consideration of the main questions in the case. * * * It seems, therefore, clearly admissible, under the language of the constitution here under consideration, that the municipalities of the state, having 'reasonable control of their streets,' may affix reasonable conditions for their

use by public utilities, and that among such reasonable conditions is the fixing of a reasonable rate. That such conditions must be reasonable the language of the constitution clearly demonstrates. *People v. McGraw*, 184 Mich. 233, 150 N. W. 836. And that the courts may determine the question of whether conditions imposed are reasonable or not this court has determined. *Telephone Co. v. City of St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520. Municipalities may not act arbitrarily or capriciously; but, when a reasonable condition upon the use of the streets is imposed, the public utility is at liberty to accept or reject it. If it rejects, it may not occupy the streets, and if already in possession under an expired franchise it may be ousted. *Detroit United Ry. v. City of Detroit*, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. ed. 1056."

A municipality, acting under proper constitutional and statutory authority, may provide in its franchise contract with the street railway company for the fixing of fares for the service by arbitration. This power is clearly recognized as follows in the leading case of *Parks v. Cleveland R. Co.*, 38 Ohio App. 315, 176 N. E. 472, *affd.* in 124 Ohio St. 79, 177 N. E. 28, where the court said: "Specifically stated, plaintiff seeks to enjoin defendant, the Cleveland Railway Company, from collecting an increased rate of fare on its cars, which was fixed by a board of arbitration in June, 1928. * * * We are of the opinion that a clear understanding of the constitutional provisions from which the municipality derived its charter-making power, and also, of the constitutional provision which enables municipalities to contract with any person or company for the operation of a public utility, will suffice for our purpose. * * * The original franchise of 1918, granted by the commission of the city of East Cleveland to the Cleveland Railway Company, was a contract entered into between the municipality and the railway company. It was passed, as provided in the constitution of Ohio, in the form of an ordinance, which was accepted by the railway company. By its terms the railway company may run and operate its cars over the streets of the city of East Cleveland for a period of twenty-five years. Accordingly, the railway company proceeded to improve its facilities by the re-laying of old tracks, by building new ones, by the purchase of new street cars, by the building of car barns, and by investing large sums in necessary equipment. It did it all on the basis of its franchise, which had a duration of twenty-five years. If it were possible upon a mere technicality to oust a public service corporation from the streets

of a municipality after it had done all that is possible on its part to be done by way of providing service, and by investing immense capital to provide such service, it would be unsafe for any public service corporation to enter into any contractual or franchise relation with any municipality. We are of the opinion that the ordinance of 1918, whereby a franchise was granted to the railway company by the commission of the city of East Cleveland, was a contract binding upon both parties, from the provisions of which neither party can escape without mutual consent. Generally speaking, municipalities have power to submit disputes to arbitration unless expressly forbidden. * * * The state constitution authorizes municipalities in their proprietary capacities to make contracts with private companies for the operation of public utilities, as was done in the case at bar. Since a franchise for the operation of a public utility granted by a municipality is designated in the constitution as a contract, it comes within the general rule which permits municipal corporations, in the absence of an express prohibition, to submit controversies to arbitration. We hold that the arbitration provision found in the franchise in the case at bar is a valid provision, and a proper exercise of the charter powers on the part of the commission of the city of East Cleveland."

For the purpose of conserving the rights of the municipality and in harmony with the law of the state giving its corporation commission the power to regulate the sale of the service of a public utility, the municipality and the public utility can not fix their rights for this service by contract, for as the court said in the case of *Tulsa v. Oklahoma Natural Gas Co.*, 123 Okla. 176, 252 Pac. 431: "It is obvious that the city of Tulsa and the Oklahoma Natural Gas Company could have entered into no binding contract concerning the furnishing of gas. The constituted authorities of the city of Tulsa were necessarily obligated regardless of any specific contractual relations to furnish heat for their municipal building, and likewise the Oklahoma Natural Gas Company, being a common carrier of gas and a public utility corporation, was necessarily bound to furnish gas to the city of Tulsa upon request. There is an implied contract that the city will pay for it, having required or permitted the gas company to make proper connections and to make an outlay of expenditures necessary for making these connections. The rights of neither party to this controversy are controlled, or can be controlled, by reason of any private contract entered into. The law determines the duty and the right of each party, and the corporation com-

mission of this state, under the law, has authority to regulate and control the sale of gas, to require the gas company to perform its duty as a public service corporation or a public utility, and likewise has the right to determine the price that should be paid for the gas by the consumer. The principle here involved is so elementary that we deem it unnecessary to cite authorities."

While a municipality under statutory authority may fix rates for water service, this power does not include the right to make the rate thus fixed retroactive in effect, for as the court said in the case of *Federal Shipbuilding & Dry Dock Co. v. Bayonne*, 102 N. J. Eq. 475, 141 Atl. 455: "The resolution of Bayonne attempting to retroactively increase the rates to be paid by the company is void, first, because it attempts to destroy rights vested in the company by the contract. * * * No power is reserved to Bayonne in this statutory enactment to retroactively increase a rate fixed by contract made pursuant thereto. * * * A municipal corporation, being a creature of the state, possesses only such power as the state confers upon it. *Breninger v. Belvidere*, 44 N. J. L. 350; *State (Terhune Prosecutor) v. City of Passaic*, 41 N. J. L. 90, 93. And in construing a grant of power to a municipality any fair reasonable doubt concerning the existence of the power is resolved against the municipality, and the power is denied. *Meday v. Borough of Rutherford*, 65 N. J. L. 645, 648, 48 Atl. 529. The last-quoted provision of the Home Rule Act grants no power to Bayonne to make retroactive water rates, but only the power to fix and collect the water rents and prices established in advance for the service to be rendered. See *Jones v. Town of Bloomfield* (N. J. Ch.) 69 Atl. 1106."

Under a municipal contract, which does not expressly fix the rate, the city may avail itself of an increased rate when properly fixed to cover the increased cost of operating its plant, as the court said in the case of *Paragould v. Arkansas Light & Power Co.*, 171 Ark. 86, 284 S. W. 529: "After the company had breached the contract various propositions were made and negotiations conducted looking to an adjustment of the differences growing out of the company's default, and we think it quite clear that the company's attitude in these negotiations was that of a party having the right to contract as to the rates to be charged rather than that of a public utility company which was required to furnish service at a fixed price to anyone desiring it. This primary rate had never been approved by or filed with any governmental agency having authority to fix or to regulate rates. * * *

We conclude, therefore, that there was no primary or

permanent rate which the city could, with certainty, have availed itself of in an attempt to minimize its damages, and the city was, therefore, entitled to recover the increased cost of operating its plant with the facilities it had when the original contract was made. But we think the right to recover this excess in cost did not extend beyond the time when waterworks improvement district No. 3 was organized. The city by its ordinances elected to proceed under the special act creating this district."

While the right to fix rates will be conserved until the municipality has fixed the rate for an incidental service, it can not refuse to continue to render the regular service, nor may it discriminate any more than a private plant in its charges for service, as is indicated in the case of *Johnson v. Natchitoches*, 14 La. App. 40, 129 So. 433: "Our consideration of the issue involved has brought us to the conclusion that plaintiff's contention is well founded. He was willing to pay and tendered to the city the amount charged for water and current actually used by him. But the city refused to accept that amount and threatened to discontinue that service if the standby charge was not paid. If the plaintiff did not owe the contested item on the bills, certainly the city had no right to refuse to furnish him water and current, because he was willing to pay those charges. He did not owe the standby charge if, in fact, no rate for such service had been fixed by the municipal authorities. He did not and could not owe for something not legally charged. * * * But to fix rates to be charged for service rendered by a municipally owned light plant is not one of them. That is a legislative function and municipalities can perform the legislative functions delegated to them only through ordinances, resolutions, or orders formally and officially adopted. * * * It will be conceded, of course, that the rates for such services must be equal, uniform, and not discriminatory. They must apply to all classes, businesses, and individuals alike, and in order that they may so apply, and in order that consumers may know what rate is demanded these rates must be officially fixed by ordinance and the proper record made and kept of them."

A municipality is obliged to continue to render service as long as payment is made for the same even in the absence of a written contract, nor can it discontinue the service without such contract after having rendered it for a number of years without any such contract, for as the court said in the case of *Brooks v. Oxford (Ala.)*, 135 So. 575: "The evidence pointed very persuasively to the conclusion that appellant's water supply had

been cut off improperly and unjustly, and hence the general charge in the terms in which it was framed was improperly given. There is no need to consider specifically the rulings on evidence shown by the record. They appear to have been induced by the argument that plaintiff had shown no contract in writing between himself and defendant municipality by which defendant was bound to furnish water to plaintiff. It is not considered that a contract in writing was necessary for the establishment of contractual relations between plaintiff and defendant municipality, and the allegation that defendant had for years furnished water to plaintiff at a rate specified in the complaint and that defendant had cut off plaintiff's water supply by reason of an alleged excess which did not in fact exist sufficed to state a cause of action."

In the absence of a special contract and in the exercise of its police power, a municipality may require reasonable rates for its service from a plant which it had purchased from a private company under which a lower rate was provided, because this rate was not reasonable and the municipality was not bound to continue to operate under it. This principle of the right to regulate rates, being conserved for the benefit of the municipality, where it is not expressly precluded from doing so by its contract, is clearly expressed in the case of *Cudahy Packing Co. v. Omaha, Nebraska*, 24 Fed. (2d) 3, as follows: "In 1903 the legislature of the state of Nebraska passed an act (Laws 1903, ch. 17) which, in effect, required the city of Omaha to buy or build a system of waterworks. * * * The contract between plaintiff in error and the water company had then still two years to run. Upon assuming control of the works on behalf of the city, the water board of Omaha raised the rates to plaintiff in error, and those similarly situated, from four and one-half cents to eight cents per thousand cubic gallons. Preceding this action there were hearings before the board in which representatives of plaintiff in error appeared. The finding was that the city could not furnish water at four and one-half cents per thousand gallons without loss, and that a rate of eight cents was essential. Plaintiff in error protested against this raise in rate, paid the increase under protest, and at the close of the two-year period brought this action to recover the excess paid over the contract rate. * * * It can not successfully be contended that, in the absence of special contract, the city might not fix reasonable rates for supplying water, which would supersede lower rates agreed on in contracts made previously between the water com-

pany and its consumers, as the legitimate effect of a valid exercise of the police power. Such action would not impair the obligation of contracts, nor deprive consumers of property without due process. *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 377, 39 Sup. Ct. 117, 63 L. ed. 309, 9 A. L. R. 1420; *Public Utilities Commission et al. v. Wichita R. & Light Co.* (C. C. A. 8), 268 Fed. 37. Unless, then, the city was limited in the exercise of this power by its contract of assumption in the deed, its increase of the rates to the Cudahy Company, if reasonable, can not be reviewed. The evidence in this case is persuasive that such increase was both reasonable and necessary. * * * At the time the contract was made South Omaha was not a part of the city of Omaha, as it now is. But in the decision of this court in *Omaha Water Co. v. City of Omaha* (C. C. A.), 162 Fed. 225, 15 Ann. Cas. 498, it was established that this water system, existing partly in Omaha proper and partly in South Omaha, was an entire system, which the city, under the legislative act, was compelled to purchase as a whole; this it did. Necessarily its authority and power, as granted by statute, must apply to the system as a whole."

§ 199. **Contract executed by municipality as business concern.**²—That such contracts are entered into by the municipality in its private business capacity and not in the exercise of its governmental or legislative powers and are therefore subject to the ordinary principles of contracts is the effect of the decision in the case of *Little Falls Electric &c. Co. v. Little Falls, Minnesota*, 102 Fed. 663, decided in 1900, where the court said: "The contracts under which the water and light plants were constructed and operated appear to be valid, and should be enforced. The village council, and subsequently that of the city, was authorized and empowered to contract for the construction of such plants, and for the supply of water and light for public uses, and had the right to grant the use of the streets for such purposes. * * * Contracts on the part of a municipality for the supply to the municipality and to its citizens of water and light are not made in the exercise of the governmental powers vested in the municipal council, but of its proprietary or business powers and * * * are governed by the same rules that govern contracts of private individuals and corporations. * * * No authority is cited tending to sustain the proposition that thirty years is an

² This section (§ 153 of 2d edition) cited in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

unreasonable length of time for a contract to supply a city with water * * * and it can not be said that these contracts were unreasonable in respect to the time they were to run."

In contracting for its own water supply the city may agree upon a rate which will be binding during the contract period unless the state sets it aside for as the court said in the case of *Belfast v. Belfast Water Co.*, 115 Maine 234, 98 Atl. 738, L. R. A. 1917B, 908, P. U. R. 1917A, 313: "By the charter of the company, the city was authorized to contract with it for water for public uses on such terms as the parties might agree upon, including the remission of taxes. Instead of making a new contract, the parties, as we have seen, adopted an existing contract. And this we think they might do under the statute. It was in effect making a contract. So that the contract which the parties have mutually acted under for nearly thirty years is based upon legislative authority. The state gave the authority. We are not called upon to consider now whether the state has reserved authority to regulate and control the terms and conditions of service. The state has not yet undertaken to do it, in this case. The state so far has said only that the parties might contract on such terms as they might agree upon. And so far as the contract was within the authority given by the charter it must be held to be valid. The legislature placed no limit upon the length of time for which they might contract, and therefore we can not. Whether the legislation was wise or unwise, was a question of public policy. It was a question for the legislature. And a legislative determination of public policy, within constitutional limitations, is conclusive upon the courts. Cities, as well as corporations, are creatures of the state. And we know of no constitutional provision which forbids a contract between city and company for a supply of water for an unlimited period. * * * There is nothing in the case which shows that the contract was unreasonable, inequitable, or unfair to the city. Instead of contracting for a gross sum, or for annual payments, they contracted for twenty-year payments. In effect, the city paid the entire hydrant rental in twenty years. A telling point is that the city has paid the entire contract price. The company has received it, and still keeps it. It would be grossly inequitable to permit the company to repudiate the contract now. See *Bank v. Matthews*, 98 U. S. at page 629, 25 L. ed. 188. It must abide the contract so far as hydrant rentals are concerned."

In leasing its property for the private operation of its street car system, a municipality is not bound unless the lease agree-

ment was made in conformity with its charter provisions, for as the court said in the case of *Barron G. Collier, Inc. v. Paddock* (Ariz.), 291 Pac. 1000: "If the lease had been accepted in merely an irregular manner, or the charter had contained no mandatory conditions regulating the specific method in which leases of its property should be entered into, it might be successfully contended that the city is estopped from denying the binding effect of its acts, the same as a private individual would be under the same circumstances. 43 C. J. 249, note 85; *City of Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498, 502. But where there has been no compliance whatever with such provisions the failure to follow them constitutes not merely an irregularity but action wholly without any validity or binding effect upon the city. To hold otherwise is to enforce contracts against the city which have not been entered into in accordance with the mandatory provisions of its charter and to permit this would result in depriving the city of the protection these were inserted to guarantee. * * * Appellant contends, however, that in the operation of its street cars and the making of contracts incidental thereto the city was acting in its proprietary as distinct from its governmental capacity and that in the discharge of such functions it was bound by the same rules of dealing that the law prescribes for private individuals or corporations. The distinction between these two functions, however, is not important here because the exercise of the city's power to lease its property, whether in so doing it is acting in a proprietary or governmental capacity, must be in accordance with the mandatory provisions of its charter; no exception to this rule of actions taken in its proprietary capacity is found in that instrument."

Under a contract by which a city leased its electric plant to a service company for operation, the city was required to bear the necessary expense of complying with an order requiring the removal and rebuilding of a transmission line used in furnishing such service, as was decided in the case of *Electric Service Co. v. Mullinville*, 125 Kans. 70, 262 Pac. 536, where the court said: "The action was one by the lessee of an electric transmission line to recover from the lessor the cost of removing the line from its established location, pursuant to an order made by public authority, and rebuilding it at another place. A demurrer was sustained to defendant's answer, and defendant appeals. * * * The improvement made it necessary that the transmission line should be removed from the old highway the entire distance from Mullinville to the county line. * * *

Because the lessee did not contract to bear the unforeseen expense, it must be borne by the owner of the line. In view of the plan of financing the enterprise by which the city was to obtain electrical service, the expense of complying with the order of the board of county commissioners should be regarded as construction cost, and should be funded and bear interest the same as original cost and extension cost."

Where a contract providing for the installation of fire hydrants was made with a privately owned public utility, which was later purchased by the municipality, this duty thereafter rests on the municipality, which is liable for the cost of installing this equipment, for as the court said in the case of *John A. Creighton Real Estate Co. v. Omaha*, 112 Nebr. 802, 201 N. W. 657, 204 N. W. 66: "The mains were extended according to the agreement, and thereafter the city of Omaha purchased the system of waterworks theretofore owned by the water company and, as heretofore held, assumed the obligation of these contracts. No hydrants were ever placed upon the mains, and, since the city had purchased the plant, of course no contracts were made with the water company to pay rentals. In the former opinion the view was taken that, until the hydrants were actually placed, or the city had wrongfully refused to install hydrants, no cause of action would accrue. * * * The Metropolitan Water District, mentioned in the statute, * * * is a municipal corporation created by statute to control and operate the water plant owned by the city of Omaha. In our former opinion no attention was given to this statute, because, while mandatory in terms, it was believed to be directory only, and did not impose the obligation to install or maintain fire hydrants except when and where there was a real need of such hydrants for fire protection. * * * A majority of the court are of the opinion that the facts alleged are sufficient to clearly show an actual and real need for the installation and maintenance of hydrants for fire protection in Creighton's first and second addition to the city of Omaha, and that, under the circumstances, the * * * statute imposes on defendants the duty of installing fire hydrants on the water mains laid pursuant to the contracts between plaintiff and the Omaha Water Company, and that the facts alleged show that defendants are wrongfully neglecting to perform the duty imposed by statute. If the conclusions arrived at are correct, then it follows that the power and the duty are in defendants to mature the obligation to refund the cost of the mains to plaintiff. To hold that the obligation to refund has not

matured would be to permit the defendants to take advantage of their own wrong, and thereby defeat a just obligation. Neither good morals nor law will sanction such a course."

A municipality, as well as a privately owned public utility, is liable to serve all applicants impartially within its territory and the acceptance of an application for service places the city under the duty to do so promptly, for as the court said in the case of *Merryman v. Baltimore City*, 153 Md. 419, 138 Atl. 324, P. U. R. 1928B, 546: "In this case the appellant at the time of making his application agreed to pay the water board for making the connection and all charges for the use of the water, as regulated by law, until the said connection was severed in the manner therein stated. The acceptance of this application, we think, created an implied contract under which the city, by implication, agreed not only to supply him with the water asked for in his application, subject to the reasonable rules and regulations of the appellee, but also to supply the water within a reasonable time thereafter. * * * As stated by Dillon, the appellee 'is under a duty to consumers to supply the water impartially to all reasonably within the reach of its pipes and mains.'"

A municipality with the power to acquire the property of a gas and water company can not insist upon the purchase of one branch of the business, but must acquire all of the plant if it elects to make the purchase, for as the court said in the case of *Tyrone Gas & Water Co. v. Tyrone Borough*, 299 Pa. 533, 149 Atl. 713, P. U. R. 1930D, 490: "So far as our research shows, the present case is the first instance where a municipality has asserted the right to sever a gas and water company. The legislative intent that this should not be done seems clear. The very words of the clause in hand, as well as all other relevant considerations, indicate that the works and property of a company subject to the Act of 1874 must be taken under clause 7 of section 34 as a whole, that there may be no piecemeal appropriations, and the assets of such a concern must be acquired in their entirety or not at all."

An option to purchase must be exercised or proper notice given of the intention to exercise it before it becomes the duty of either party to appoint an arbitrator, for there is no obligation on the municipality to exercise its option from the mere fact that it holds one. This principle is clearly stated as follows in the case of *Andalusia v. Alabama Utilities Co.*, 222 Ala. 686, 133 So. 899: "On the threshold of the case the question of chief concern is

whether such an option is the subject of specific performance. * * * A mere option to purchase is executory per se. In the nature of it, the purchaser has the election to purchase or not. But the insistence is that this option is a part of a more comprehensive contract, a franchise, looking to the construction and profitable operation of these plants through a long series of years; and that after all these benefits have been reaped, a valuable consideration for which the option was given, equity and justice cry out against a repudiation of contractual obligations in refusing to name an arbitrator, etc. Without question the franchise rights and privileges constituted a consideration for the option itself. All options must be supported by a consideration as other contracts. It can not be said the benefits mentioned constitute part payment on the purchase-price for the plants on exercise of the option. The full value is to be fixed and paid as a condition of the purchase. The benefits accruing to the city and its inhabitants by the service rendered, along with the option to purchase, constitute the consideration for the franchise rights. * * * Such was the declared law of Alabama when the contract now involved was entered into. It is in the nature of a rule of property. Appellant's bill can not be sustained without overruling that case. It will be adhered to. What we have written is not intended to pass upon the sufficiency of the election to purchase and notice thereof to put on respondents the duty to appoint an arbitrator; nor do we consider whether a new franchise was effectively granted, and, if so, whether it is still in force. In no event, we think, can the complainant sustain the bill for specific performance."

This same court also sustained the power of the municipality, on its election to exercise its option and with the consent of the public service commission for it to do so properly secured, to have specific performance after an accounting proceeding, which was pending, had been determined. Until the amount due for the plant had been ascertained by an accounting, naturally the city could not tender the amount and secure its deed to the property, for as the court said in the case of *Alabama Water Co. v. Anniston* (Ala.), 135 So. 585: "The power of the city to purchase, own, and operate waterworks serving customers within and without the city limits was ample at the date of this contract; and the public service commission had expressly recognized the right of the city under its option to purchase. No question of ultra vires in the original transaction of 1910 need be considered. * * * Likewise depreciation of one per cent

on the plant from year to year includes cost of extensions, replacements, and betterments ascertained as per contract. One per cent of the value of the entire plant as of July 1, 1911, and each year thereafter, is the equitable construction of this provision according to its intent. We find nothing so indefinite and uncertain on the face of the contract nor in the light of subsequent events to render specific performance impractical. * * * We find nothing inequitable in the specific performance of this contract, either inhering therein or arising from subsequent events. Further discussion on this line is deemed unnecessary. * * * As heretofore mentioned, an accounting was called for by the terms of the contract before the city could know what purchase-price was to be paid. The city was a party to the abandonment of the arbitration, and chose an accounting in equity, which is yet pending. At no time to this date has the city been in position to make tender and demand a deed with right of possession."

Where a municipal corporation contracted for public utility service, the court construed the contract to be exclusive, although it was not so expressly, for as the court said in the case of *Holton v. Kansas Power & Light Co. (Kans.)*, 9 Pac. (2d) 675: "In selling electric current to outside cities Holton acted purely in its private proprietary capacity, and as a producer and seller of electric current it stood on the same footing as the Kansas Power & Light Company. * * * The positive engagement excluded purchase from anyone else. While a promise not to purchase from anyone else was not 'expressed' in those very words, the promise is implicit in what was expressed, and the essentials of a valid contract are present. * * * The public service commission approved the contracts of the sale to the Kansas Power & Light Company, directed that the proceeds of sale be applied on outstanding obligations of the cities incurred in erecting or purchasing their plants, and directed that the balance be paid into the general revenue funds of the cities. The sales were for cash, except that the power and light company assumed payment of some bonds issued by Soldier. Presumably the sale prices have been paid, and the proceeds have been applied as directed. The approved contract with each city provided that the city would grant a twenty-year franchise to the purchaser to supply the city and its inhabitants with electric current. The franchises were granted, and Holton acquiesced in the situation thus created."

Where the city acting within its authority had contracted for

public utility service the contract is binding and may not be repudiated because of increased costs due to war conditions. As the court decided in *Moorhead, Minnesota v. Union Light, Heat & Power Co.*, 255 Fed. 920: "Does the fact that defendant's contract with the city has, by reason of the European War, become unprofitable, justify the court in releasing defendant from the contract? Does a public utility company, which contracts to supply the public with a commodity like gas or electricity, occupy a different position from other contractors who have agreed to supply articles the cost of which have been greatly enhanced by the war? Is a public utility company entitled to modify its contract whenever a change is necessary in order to make performance profitable? When cities are expressly vested with power to enter into contracts as to rates, it is now established by repeated decisions of the Supreme Court that such contracts are binding upon the city even though the public utility company may make extortionate profits therefrom. *Detroit v. Detroit, &c. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; *Vicksburg v. Vicksburg Water Co.*, 206 U. S. 496, 27 L. ed. [Sup. Ct.] 762, 51 L. ed. 1155; *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. ed. 176. Public utility companies are insistent that their rights under such contracts be protected by the courts against every attempt of the state or city to reduce rates, and when the city's power to make the contract is clear the courts have uniformly restrained their violation. If such be the law in favor of public utility companies, why should not the converse be equally true, and such companies be compelled to perform their contracts even though they may result in a loss? * * * If at the time it was made the contract was free from fraud, mistake or imposition, parties must be left free to make their contracts, and it is the duty of the courts to enforce them as made. The same doctrine has been applied to contracts between municipalities and public utility companies. *Logansport, &c., Gas Co. v. Peru (C. C.)*, 89 Fed. 185; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *Westfield Gas & Mining Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Pond on Public Utilities*, sections 431, 432."

To the same effect that enhanced prices, due to war conditions, are not sufficient grounds for setting aside such a contract, is clearly decided in the case of *Columbus R. Power & Light Co. v. Columbus, Ohio*, 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1649, P. U. R. 1919D, 239: "It is undoubtedly true that the breaking out of the World War was not contemplated,

nor was the subsequent action of the War Labor Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages, might reasonably have been within their contemplation when the contract was made, and provisions made accordingly. There is no showing in the bill that the war or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as, in the nature of things, there can not be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance. It may be, and, taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly-constituted authorities having the control of the subject-matter. We reach the conclusion that the district court was right in holding that this bill presented no grounds absolving the company from its contract, and justifying the surrender of its franchise."

§ 200. **Contract for excessive period void.**—Where the contract period exceeds that expressly provided for in the statute, the courts agree in holding that the contract is void as to the excess period and most of the cases also hold that it is entirely void for the reason that having attempted to execute a single contract beyond its power to contract, nothing remains for the agreement is not severable and as it can not stand as made it must fall in its entirety. Accordingly in the case of *Gaslight & Coke Co. of New Albany v. New Albany*, 156 Ind. 406, 59 N. E. 176, decided in 1901, after quoting from the case of *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127, in holding a contract to be wholly invalid providing for the lighting of the city beyond the period authorized by law and not merely invalid as to the excess period, the court said: "Besides, it is elementary that municipal officers have no powers beyond those expressly conferred by statute, or necessarily implied, to enable them to make effective

the powers granted or to protect the public welfare. Therefore, when they attempt an act which is beyond the limit of their power, the act has no official sanction, and is no more effectual than if performed by nonofficial persons. As a municipal act it is wholly void, and, being void, nothing of substance may flow from it. A reputable author, in reviewing the power of municipal corporations to make contracts, and in considering the particular question now before us, uses this language: 'When a municipal council is authorized by statute to contract for a period not exceeding ten years, its contract for twenty years or for an indefinite time can not be sustained as a contract for ten years, but is entirely void.' Beach, Mod. Law Cont., § 1148. See, also, 3 Cook, Corp. (4th Ed.) § 927; Manhattan Trust Co. v. City of Dayton, 8 C. C. A. 140, 59 Fed. 327, 335; State v. Town of Harrison, 46 N. J. Law 79, 85; City of Somerset v. Smith (Ky.), 49 S. W. 456."

The contract of the municipality for public utility service is binding, except as to its exclusive feature because within the power of the city to make, for as the court said in *La Follette, Tennessee v. La Follette Water, Light & Tel. Co.*, 252 Fed. 762: "Under this legislative authority the city could, in my opinion, lawfully enter into a contract for the furnishing of city water and electric lights for such period, and provide therein for the number and character of hydrants and electric lights to be maintained, and the prices to be paid therefor during such period. Obviously, unless authorized to so contract, it would be, as a matter of business, practically impossible to obtain a party willing to make the necessary investment in a plant adequate to enable such water and lights to be furnished. Section 15 of the charter specifically provided that 'the city council may, at its own discretion enter into contracts for the public supply of gas, water and electric lights for the full period of any franchise granted, by this act or by said council,' that is, for a period of thirty years. The right to enter into such a contract necessarily embraced, as I view it, the right to agree as to its essential terms, including both the number and character of the public facilities to be furnished, and the price to be paid therefor during the contract period. * * * I do not think, however, that the ordinance contract of June 6, 1905, was rendered void in its entirety by reason of the fact that in addition to lawfully contracting for a supply of city water and lights for thirty years, it also sought, without authority, to give plaintiff an exclusive franchise for thirty years for supplying water, lights, etc., to the inhabit-

ants of the city. The franchise for supplying facilities to the inhabitants for private use related to an entirely separate and distinct matter from that of supplying facilities to the city for public use, and the fact that it was sought, without authority, to make the franchise for supplying the inhabitants exclusive, does not render the other separable features of the contract void, especially those in reference to the supplying of facilities for public use, but merely has the effect of rendering invalid the exclusive feature of the franchise sought to be given for the purpose of supplying the inhabitants."

§ 201. **Contract with duration not fixed is optional, not perpetual.**—Where the duration of the contract is not fixed it will not be held to be perpetual, for in effect it amounts to an agreement which may be terminated at any time on reasonable notice by either party, for as the court in the case of *Risley v. Utica*, 179 Fed. 875, decided in 1910, said: "The company did not agree to supply water for any length of time, but the city agrees to pay at the rate and on the basis stated so long as the company supplies water. These same pipes and conduits convey the water of the company for supplying the citizens of Utica for which they pay at certain established rates. The city is a customer, but pays for its supply on an entirely different basis. I have no doubt that the city of Utica, assuming that the said contract was assignable and duly assigned to the Consolidated Water Company and is binding during the election or consent of both parties to operate under it, may terminate such contract on giving due and reasonable notice of its election so to do. It is not a contract that can be enforced in perpetuity by either party. There is no word or clause in it that binds the company to continue to furnish water under it, and I do not think the city could compel specific performance for all time. Neither can the company. It is not mutually enforceable. Its continuance is optional, but to terminate same notice must be given and a reasonable time fixed when such termination shall take effect."

Where a contract for water service has no fixed period of duration, it is not continuous and where conditions require an abandonment of the service or a change in the location of the plant, a nonresident of the city can not compel the continued furnishing of service, especially where the city was not authorized to extend its mains in order to render service outside its limits, and where continuing the service would have required a substantial municipal expenditure. This principle is clearly enunciated as follows in *Teague v. Sheffield* (Tex. Civ. App.), 26

S. W. (2d) 417, where the court said: "The contract under consideration did not involve merely the acquisition by appellant of an easement or right-of-way to afford access to its plant or ingress and egress to and from the same. Appellant at the time had access to its plant over a public road already established. While the use of the same was attended with some inconvenience, such use was neither impossible nor impracticable. Said contract involved in fact the opening and improvement of a new road or highway, which was by the express terms thereof to be deeded to the county for the declared purpose of making the same a permanent public road. Such purpose was promptly effectuated; such road made public and incorporated as a section of a rural mail route. Said contract did not provide for the exercise by appellant of any manner of control over said road after the same was prepared for travel as provided therein. The rights and benefits secured by appellant by virtue of said contract were such only as were enjoyed in common with the general public traveling in that part of the county. The money spent by appellant in improving such road and the water furnished and to be thereafter furnished by appellant to appellees as long as said road should remain open were in effect a bonus or donation for such purpose. No such authority was expressly conferred by any of the articles of the Revised Statutes * * *. Nor do we think any such authority could have been reasonably implied therefrom or held indispensable to the maintenance of appellant's water plant. * * * Said contract is silent as to how or where the stipulated water was to be delivered or made available to appellees. We may assume that the parties at the time considered that the location of appellant's water plant was permanent and that such water could be secured by appellees by tapping appellant's main at that point, as they did do. Appellant did not attempt to bind itself in terms to maintain a water plant at that place so long as said road should remain open. Such an agreement would have been in effect that such maintenance should continue indefinitely or forever, at the pleasure of the county or traveling public, regardless of the fact that the interests of the appellant as a city and the interests of its inhabitants might render it either expedient or possibly necessary to abandon the same. * * * Appellant did not in terms agree to furnish to appellees the stipulated water at its plant or at the point where they tapped its main. To comply with such an agreement after the abandonment of said plant and the collapse of its old main would have required appellant to lay a new and adequate

main from its corporate limits to such point at an expense, according to the testimony, of approximately \$3,600. Prior to the enactment of chapter 88, General Laws of Texas 1909, afterwards articles 769 to 772, inclusive, of the Revised Statutes of 1911, it was held in *City of Paris v. Sturgeon*, 50 Tex. Civ. App. 519, 110 S. W. 459, 461, 462 (writ refused), that a city incorporated like appellant under general law, had no authority and could not bind itself by contract to furnish one not an inhabitant thereof with water for use outside its corporate limits. After the passage of said act, the provisions thereof authorizing the sale of water to persons or corporations outside city limits were before the court for construction in *City of Sweetwater v. Hamner* (Tex. Civ. App.), 259 S. W. 191, *supra*, pages 193-196 of 259 S. W. and it was there held that such provision did not authorize a city to extend its own mains for the purpose of furnishing water to persons residing and using the same outside its limits. Appellant was without lawful authority, either express or implied, to bind itself to maintain a water plant continuously and indefinitely at said point, or to bind itself to lay or maintain a water main from its corporate limits to such point."

Under a franchise contract of a municipality, providing for the fixing of rates by arbitration, which is indefinite as to the period of its duration, rates may be adjusted at any time for the purpose of making them fair and reasonable in harmony with the terms of the contract. This principle is well stated as follows in the case of *New Haven Water Co. v. New Haven*, 106 Conn. 562, 139 Atl. 99, P. U. R. 1928B, 475: "The right of a city to contract away its right as to the rates to be charged by a public service corporation is a limitation imposed upon the police power. Except as so limited, its power can not be contracted away. The state may not authorize a municipality to establish, by contract, rates to be charged by a public service corporation for a definite term, which is unreasonable in time; it can not authorize a contract as to rates for an unlimited or perpetual term, which necessarily would be grossly unreasonable in time since this would be a surrender by the state of its exercise of the police power of fixing and regulating rates. * * * The contract as to the city while for an indefinite period does not contract away the police power, since it provides that the rates must be fair and reasonable and gives a remedy to the city by way of arbitration if the rates charged are unreasonable, and particularly specifies the items which shall be taken into consideration by the arbitrators in fixing rates which are fair and reasonable. * * * Since the

duration of the rates in the contract before us as to the water company is for an indefinite term, the water company may at any time make application to the public utilities commission for a finding that this term is unreasonable, and fixing a reasonable term and the rates as to it for such term. Courts will not interfere with the legislative authorization as to rates except in clear cases. But where the exercise of the police power in fixing rates for an unlimited time is manifestly unreasonable, courts will interfere."

§ 202. **Municipal contract not exclusive unless expressly made so.**—The case of *Cunningham v. Cleveland, Tennessee*, 98 Fed. 657, decided in 1899, furnishes a good statement and illustration of the legal principle that a contract for utility service entered into by the municipality with a private corporation is not exclusive unless made so expressly, the court saying: "It is true that the city binds itself to use for itself forty public hydrants and eighteen public lights; but it might at once, without the slightest infraction of the contract, agree to rent forty other public hydrants and eighteen other public lights from other persons or companies than the grantees of these franchises. * * * There is only one case which would support the contention of appellee upon this head.³ If that case can not be distinguished from the case at bar, it suffices to say that we do not agree with it. * * * The truth is that it is most difficult to reconcile with the *Brenham* case the decision of the Supreme Court of the United States in *Walla Walla, Washington v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, for, though the Supreme Court points out one or two distinctions between the *Brenham* ordinance and the *Walla Walla* ordinance, the main fact remains that in each ordinance the city gave to the water company the right to use the streets and furnish water for a period of years, and, for the water to be furnished for strictly public use, agreed to pay a stipulated sum for the same period."

After a municipality has leased its line from which customers were receiving service, it may not thereafter make a contract with another company authorizing it to use this line and furnish service to customers on that line and to the municipality, especially where the municipality failed to give any notice of its intention to make the later contract and to terminate the former one, for as the court said in the case of *Oklahoma Natural Gas Corp. v. Municipal Gas Co.*, 38 Fed. (2d) 444: "The Oklahoma

³ *Brenham v. Water Co.*, 67 Tex. 542, 4 S. W. 143.

Natural Gas Corporation brought this suit against the Municipal Gas Company and the city of Muskogee for a decree awarding specific performance of a contract by which the city leased to the Muskogee Gas & Electric Company, predecessor of the appellant, a certain gas line, and an injunction against interference with its customers on that line. * * * The city breached the contract, without notice, by executing another contract with the Municipal Gas Company of Muskogee, whereby that company was authorized to connect its pipe line with the city's line, and furnish gas to the city and to customers upon that line. * * * The Municipal Gas Company proceeded to disconnect appellant's line from the city's line and to connect its own line therewith, and to solicit contracts from appellant's customers and by coercion and threats to cut off and reduce the price of gas, took over seventy-nine of the appellant's customers, for a time using appellant's laterals, but later constructing its own laterals and installing meters. * * * It is alleged in the bill, that appellant's damages from the loss of customers may not be estimated, and there was undisputed testimony it can not be known how long a particular gas supply will be available, or for what time in what amount and number customers will take gas in the future. * * * Instead of giving notice, the city saw fit to commit a flagrant breach of the contract, and, after the resulting damage was done to the appellant, it sought to declare the contract terminated. In our opinion, a notice would not be operative, unless the appellant is restored to the position it would have enjoyed by a ninety days' notice with its attendant privileges. As we conclude the contract has not been terminated, we must pass upon the rights and remedy claimed by appellant. * * * Of course, the remedy is allowed only where the complainant has no adequate remedy at law. Appellant can not be adequately compensated in damages from the very nature of the injury it has sustained. * * * Appellant's claim to relief in this case by specific performance and injunction is fully sustained by authority."

In the construction of municipal contracts in favor of the public no exclusive water right will be presumed in favor of the purchaser of a water supply in the absence of any expression in the contract to that effect, and the municipality may dispose of any remaining water rights to others, for as the court said in the case of *Twin Falls Canal Co. v. American Falls Reservoir Dist.* No. 2, 59 Fed. (2d) 19: "Appellant was not a party to the contract. Nor was benefit expressly, distinctly, or explicitly to accrue to it. No intention of the parties to secure to appellant per-

sonally the benefits of this provision appears. There is nothing indicative that appellee and the United States had in view any other party or parties, or any other thing or person except their own advantage. *Sayward v. Dexter, Horton & Co.*, 72 Fed. 758, 765 (C. C. A. 9). The contract is under seal, and appellant, not being in privity with either party, and it not being expressly made for appellant's benefit, can claim no right thereunder. * * * Appellant's right is limited to the dam and the right to divert for beneficial use appropriated water, and no incidental right except such as is reasonably necessary to its enjoyment. It has no exclusive right to the water course below the head of slack water above the dam. There is no need therefor to the enjoyment of the easement; and it may not deprive others of asserting the right, or infringe upon fixed rights of appropriation by others. The land being public, reserved (see sections, supra), and the laws granting to appellee a right of way in the river to carry the water from the reservoirs above, and the right of diverting the volume thereof by its gravity system, until the diversion conflicts with the appropriated right of appellant and deprives it of necessary waters appropriated for public use, no right is infringed."

§ 203. **Impairment of franchise rights by competition not prohibited.**—That the effect of contracting with or creating another municipal public utility does not violate the contract rights or interests protected by the constitution where the former company did not secure an exclusive right or franchise is well expressed in the case of *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497,⁴ decided in 1906, in the following language: "This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served by conferring such authority was for the legislature to determine. It is manifest that if an independent system might be thus established, the defendant's property would be diminished in value, and its business perhaps destroyed by reason of the competition, but the company under St. 1882, p. 101, ch. 142, by which it was incorporated, enjoyed no vested rights which gave it immunity from this contingency, or rendered such legislative action unconstitutional. Nor is legislation of this nature an appropriation of private property for a public use without due

⁴ Writ of error dismissed in 207 U. S. 604, 52 L. ed. 360, 28 Sup. Ct. 253.

process of law under the Fourteenth Amendment to the federal Constitution."

While contract rights and vested interests must be recognized and protected, the existence of a municipal contract for public utility service does not preclude the state from acting in the interest of public necessity and convenience, for as the court said in the case of *Salisbury v. Salisbury Water Supply Co. (Mass.)*, 181 N. E. 194: "The town had authority to make a valid contract for a supply of water for fire protection and town purposes, *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *Oak Bluffs v. Cottage City Water Co.*, 235 Mass. 18, 126 N. E. 384, and, at least after the recognition of the contract by Spec. St. 1915, ch. 243, for supply for domestic and other uses by its inhabitants as individuals. But the commonwealth has statutory provisions covering the whole field of the supply by water companies to persons desiring water (G. L., ch. 164, sec. 92, made applicable to water supply by G. L., ch. 165, sec. 2). Nothing in the words of the statute makes the existence or nonexistence of a contract of the water company with the applicant or with any other water taker or person desirous of obtaining water a condition of action by the department. The immediate right of the applicant is the matter on which the department is to act; but, in deciding, the department well may consider contract rights of others as well as of the applicant. It has power we think to disregard such rights if they exist but are not found consonant with sound considerations of public necessity or appropriate action in the matter before it. It can not invade vested rights or impair the obligation of a contract but whether its action is proper or not must be determined on appeal or review of its decision pursuant to the statutory provision for appeal or review. The existence or nonexistence of contracts does not affect the universality of its jurisdiction where as here a municipality is concerned. It is to the department and not to the courts that resort must be had at the outset. * * * The town has not put itself in the position of an applicant under the statute; but, since application for extension to Rings Island was made, jurisdiction in the department under the statute had attached, and the town could not thereafter seek another forum. * * * Jurisdiction existed in the department which had attached upon due application, and thereby, under the statutes, ousted jurisdiction in the superior court to act upon this bill in equity."

§ 204. Contract not exclusive to preserve competition.— That the purpose of the courts in adhering to this principle is

to avoid the creation of a monopoly which would stifle competition and that for this reason they will refuse to uphold a contract for exclusive service by a public utility is shown by the early decision in the case of *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781, decided in 1880, where the court said: "It is well known that rapid inter-communication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers, merchants, buyers, sellers, all are brought in close proximity, and daily intelligence is given of the world's transactions. Trade is encouraged, industrial enterprise stimulated, and business in all its various branches builds itself upon knowledge. In war the rapid communication of intelligence is almost incalculable; in peace it is scarcely less so. Shall the means then by which it is transmitted be monopolized by a contract between two artificial beings, invisible, intangible, and existing only in contemplation of law? When such exclusive rights exist, or such monopolies are established, the same should be done by a legislative grant, and not by an individual contract. Our judgment therefore is that these contracts are especially made and entered into to cripple and prevent competition, and that they thereby enable the plaintiff in error to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law; they are against the public policy, because they tend to create monopolies, and are in general restraint of trade."

While the courts will adhere to the principle of preserving competition to avoid the creation of a monopoly, unless the contract expressly so provides, a contract, fair on its face and not perpetual in its terms, between a public utility and a customer, will be enforced so long as adequate service is provided, for as the court said in the case of *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353, 75 L. ed. 1112, 51 Sup. Ct. 476, P. U. R. 1931D, 221: "The latter took gas as agreed until January 2, 1929. About that time a company controlled by it completed a pipe line from gas fields to the glass plant. The glass company asserted that the contract was invalid because contrary to public policy and began to take practically all the gas it needed from its own subsidiary. Petitioners brought this suit to enjoin the glass company from taking gas from anyone other than the pipe line company and to require it specifically to perform the contract. * * * No question of perpetuity is presented. And it is not shown that this contract was made as a part of a plan to create

a monopoly or restrain trade or that it infringes any statute or regulation made under the authority of the state. * * * The contract was not arbitrarily or unfairly imposed upon the glass company. It secured the exceptional means of service which the court held the pipe line company was not bound to furnish. The contract left the glass company free to obtain its supply elsewhere unless the pipe line company's service was adequate and bound the latter to rates—presumably just—fixed by public authority. Public utilities may enter into reasonable arrangements with their customers when warranted by special circumstances. * * * The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade. The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms.”

§ 205. **Contract for division of territory among competitors void.**—For the same reason the courts refuse to uphold a contract between two competing public utility companies, the purpose and effect of which is to destroy competition and restore a monopolistic condition by dividing the territory between them, for as the court said in the case of *Chicago Gaslight & Co. v. Peoples Gaslight & Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124, decided in 1887: “Under its charter, appellant had the right to make and sell gas to be used for lighting all the divisions of the city of Chicago, and all of the streets and buildings therein. It had as much power and authority to lay pipes in the streets of the west division as in those of the north and south divisions. By the contract, it agreed to lay no mains or pipes in the west division, nor to furnish or sell any gas to persons living there, for a period of one hundred years. It thereby bound itself to avoid the performance of a duty which it owed to the public. The manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the state. The services rendered, and to be rendered, for such grants are of a public nature. Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as of the company. * * * But the appellant binds itself, by the contract now under consideration, to surrender and abandon altogether, for one hundred years, all the right con-

ferred upon it by its charter to manufacture and vend gas in the west division. By so doing 'it abandoned a public duty,' and a court of equity will not aid either party in the enforcement of such a contract. * * * The contract between these corporations tends to create and perpetuate a monopoly in the furnishing of gas to the city, and is therefore against public policy."

§ 206. **Exclusiveness of franchise may be waived.**—The counterpart of this situation is furnished in the case of *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, decided in 1879, where the court upholds the contract between two corporations providing public utilities whereby the one relinquishes its exclusive contract rights for the benefit of another with the apparent effect of creating competition. In upholding this contract the court said: "This right to exclude competition was not a right vested in the company for the benefit of the public, because in its very nature it was injurious to the public; but it was a right vested in the company for its own benefit, which it might, therefore, surrender with the consent of its stockholders. * * * We think it clear that the St. Louis Gaslight Company did nothing more than surrender its right to exclude all competition in that part of the city lying north of Washington avenue, reserving to itself the right to meet any demand which might lawfully be made upon it by the public. There is no abandonment or surrender on the part of the St. Louis Gaslight Company of its right, or surrender or abandonment of its duty to make and vend gas north of the south line of Washington avenue. Nor does the contract transfer to the Laclede Gaslight Company the right to make and vend gas in that district. The Laclede Gaslight Company obtained its right to make and vend gas, not from the St. Louis Gaslight Company, but from the act of the General Assembly incorporating it, subject, of course, to the vested rights of the St. Louis Gaslight Company."

§ 207. **Contract limiting service to exclude competition void.**—The case of *Central New York Tel. & T. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, decided in 1910, is an interesting decision, the effect of which is to hold invalid the contract of a hotel for exclusive service with one telephone company by refusing to enjoin the hotel from contracting with a competing company for additional service. The decision recognizes the fact that the contract for such exclusive service because of the nature of the utility furnished necessarily discommodes the public at large by making it impossible for any of the citizens

to communicate with the hotel except the customers of the particular telephone company. In the course of its decision the court indicates the reason upon which it is based in the following language: "It is manifest that the exclusive clause is a contract in restraint of trade. It prevents anyone in the Yates Hotel from having telephone communication with customers of other telephone companies than the plaintiff. It prevents the persons served by such other companies from having telephonic communication with the Yates Hotel. It likewise destroys competition by shutting out all rivals of the plaintiff. * * * The feature of the modern telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with hundreds and oftentimes thousands of others. This makes it an instrument of great public convenience and utility, the usefulness of the service offered by each company being directly proportionate to the number of persons who can be reached thereby. The franchise having been granted because of this very element—that is to say, the capacity to serve the community so generally by serving so large a number of individuals constituting the community—it can not be tolerated that any grantee of the franchise shall exercise it in such a way as to lessen the value of the telephone as an instrumentality of service to the public. If a telephone company may contract for the exclusion of any other telephone service from the premises of its customers, it may thus deprive all those customers of telephone communication with every person who takes telephone service from rival concerns, and thus prevent just what all telephone franchises are designed to promote—that is, the availability to every member of the community who desires it, and can afford to pay for it, of the most extensive telephone service attainable. * * * It is sometimes argued that the presence of two telephone systems in a given district is a disadvantage to the community, which is best served by one system reaching all subscribers; but one system will never be made to reach all subscribers as cheaply as would otherwise be the case if the possibility of competition is destroyed."

§ 208. **Contract for unnecessary service unreasonable and invalid.**—The limitation beyond which the courts will not permit the municipality to go in contracting for its public utility service for the sake of preventing the abuse of the discretionary power vested in the municipality is well stated in the case of *Flynn v. Little Falls Electric & Water Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106, decided in 1898, where the court said: "Little Falls

was and is a new and small city, whose future was uncertain. Thirty years is almost a generation, and, in this age, a long time in the history of any community. It has been attempted to bind it for that length of time to pay for between thirty-five and forty per cent more hydrants than its present needs require, and to pay for them one hundred per cent more than their present value. It may never need any such number of hydrants, and the value of their use may never increase so as to equal the price agreed to be paid. For these reasons we are of the opinion that the provisions of this ordinance, providing that the city should pay this price for this number of hydrants for thirty years is, as to time, unreasonable and void, as being beyond the scope of the authority of the municipal authorities."

§ 209. **Perpetual contract void.**—The case of *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. 424, decided in 1904, held void a perpetual contract for the water supply of the defendant city. The opinion contains a brief summary of some of the cases deciding what are reasonable periods for such contracts. It thus shows that, "in the case of *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, a contract for fifty years was sustained; in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, a contract for twenty-five years was sustained; in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, a contract for thirty years was held not unreasonable."

§ 210. **Contract tending to exclude municipality strictly construed.**—Unless the municipality clearly provides in its contract for service that it will not itself acquire and operate a similar municipal public utility the courts will not find by implication that it has done so for the reason that the rule of strict construction would prevent and for the further reason that a finding to the contrary would preclude the municipality from a further exercise of any control over the situation, although it had not expressly agreed to preclude itself in this way from continuing to regulate and control the question, so that as held in the case of *Meridian, Mississippi v. Farmers Loan &c. Co.*, 143 Fed. 67, decided in 1906: "Unless there can be found in the contract in question words clearly depriving the city of Meridian of the right to build, own, and operate waterworks, the court should not by implication give such effect to the contract. The grant to Kuhn, which was transferred to the Meridian Waterworks Company, should be strictly construed against the grantee, and whatever was not

unequivocally granted is withheld. *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 53 L. ed. 371. * * * The city not having bound itself by contract not to build and operate waterworks of its own, the legislature authorizing it to do so, and its ordinances pursuant to such legislation, do not impair the obligation of its contract. * * * The fact that the competition of the city in the operation of its own waterworks will lessen the value of the waterworks company's plant does not amount to a taking of property without due process of law, within the meaning of the federal Constitution, nor to a taking of property without just compensation, within the meaning of the constitution of the state of Mississippi."⁵

A leading decision of the Supreme Court of the United States directly on this question is found in the case of *Knoxville Water Co. v. Knoxville, Tennessee*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224, decided in 1906, where the action was to enjoin the defendant city from erecting and operating a waterworks system in competition with that of the plaintiff, who claimed the exclusive right to render such service by virtue of a contract wherein the said city agreed "not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville or the inhabitants thereof for a period of thirty years." In speaking of this contract the court said: "We fail to find in it any words necessarily importing an obligation on the part of the city not to establish and maintain waterworks of its own during the term of the water company. * * * The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own."

§ 211. **Municipality may exclude itself expressly.**—But even where the statute does not permit the municipal corporation to grant an exclusive franchise or make an exclusive contract for service, the courts still hold that it may preclude itself by the terms of a franchise and contract for such service from itself entering into competition with its grantee for a reasonable period. The case of *Walla Walla, Washington v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77, decided in

⁵ *Helena Water Works Co. v. Helena, Montana*, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. 40.

1898, is the leading one embodying this principle of law. In sustaining a franchise and an agreement on the part of the city, made under proper statutory authority for securing the supply of these public utilities by private capital, which expressly excluded the municipal corporation for the period of twenty-five years provided in the franchise and contract from engaging in competition with such private enterprises in supplying these utilities to itself and its inhabitants, the court took the position that it was in effect nothing more than an express promise to carry out the agreement of its franchise to the company in good faith; and held that such a limitation on its own power did not amount to the granting of a franchise exclusive of all competition which the charter of the city in question expressly provided could not be done.

§ 212. **Municipality excluded by exclusive contract.**—The case of *Vicksburg, Mississippi v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660, decided in May, 1906, is concerned with the question under discussion in the three former cases and its decision is based expressly on the Walla Walla case. The court indicated its intention to give full credit to the authority of the Knoxville Water Co. case by saying: "And unless the city has excluded itself in plain and explicit terms from competition with the [private] waterworks company during the period of this contract, it can not be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in *Knoxville Water Co. v. Knoxville, Tennessee*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224, *supra*." The court, by Day, J., then proceeded to find in the franchise under construction in the case an agreement binding on the city which excluded it from owning and erecting such a plant during the period of such franchise by virtue of the fact that it had been made in terms exclusive for such period. The court said: "We can not conceive how the right can be exclusive, and the city have the right, at the same time, to erect and maintain a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in the grant."

That in anticipation of the expiration of the contract period the municipality may during such period install a plant of its own to serve itself and its inhabitants thereafter is established by the case of *Vicksburg v. Henson, Mississippi*, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. 95, decided in 1913, where the court said: "We see no reason why the city might not, if it so de-

terminated, make preparation for water supply to its own citizens which would be available upon the expiration of the contract, the contract accomplishing that purpose until by its terms it had expired. To appropriately accomplish this required time, and we think the city was within its rights, not being obligated by any contract to purchase the works of the Waterworks Company, the company having been content to accept the franchise without this requirement, and was free to make other adequate provision to meet this essential requirement of the inhabitants of the city."

§ 213. **Commission control.**—Rates may not be modified by public utility commissions when fixed by contract between the city and the public utility under proper authority for as the court said in *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421, 124 N. E. 246, P. U. R. 1920D, 1034: "This court has repeatedly held that the filing of such acceptance constitutes a contract between the municipality and the company, for the period of ten years; so that here we are dealing with two contracts between the parties to this litigation, one in relation to the electrical current furnished to the city for lighting and power purposes, and the other for current furnished the citizens of Steubenville for the same purposes. * * * Even if it were conceded that the statutes of this state do not confer power upon the council of a municipality to fix arbitrarily, or by contract, the rate an electric light company might charge for electric current for power purposes, nevertheless section 4, article 18, of the Constitution, as amended 1912, expressly authorizes a municipality to contract with any public utility, the product or service of which is to be supplied to the municipality or its inhabitants. While this section does not authorize the municipality to fix an arbitrary rate to be charged by a public utility for the commodity it furnishes to the municipality or its inhabitants, it does clearly authorize a contract between the municipality and the utility, and that contract would necessarily include the price to be paid for service or commodity to be furnished by the utility. Therefore, when the utility names the rate at which it is willing to furnish its product, and the city accepts that rate on its own behalf and on behalf of its inhabitants, and enters into a contract, the terms of which include the rate so agreed upon, such contract including the agreement as to rate, clearly comes within the authority conferred upon the municipalities by section 4, article 18, of the Constitution of Ohio."

To the same effect denying power in the public utility commission to modify rates fixed by contract is the case of *Cincinnati v. Public Utilities Comm.*, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705, P. U. R. 1919C, 119, holding that: "The purpose was that the new law should be put into operation as to contracts about to expire and those thereafter made. * * * The contract of 1905, in the present case, having been entered into by the city in the exercise of contractual capacity and authority expressly conferred upon it, and having conferred upon the company valuable privileges and rights in the public streets and places of the city on the conditions named therein, is protected by the provisions of section 10, article 1, of the federal Constitution, that no state shall pass any law impairing the obligation of contracts. A franchise is included within the broader term 'grant,' and the same general principles are applicable to it in reference to the constitutional inhibition as to the impairment of the obligation of contracts. 6 Ruling Case Law, 340; 12 Corpus Juris, 1009; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 534, 24 Sup. Ct. 756, 48 L. ed. 1102. It is urged that the creation of the public utilities commission is expressly authorized by section 2, article 13, of the Constitution, as adopted in 1912. This court, in the exercise of its revisory jurisdiction under section 2, article 4, of the Constitution, has given full recognition to the power and jurisdiction of the public utilities commission, and to the efficient aid it has given as an administrative agency of the government, but it is neither advisable nor possible to confer upon it power in disregard of rights protected by the guaranties of the constitution. * * * As we have seen the state and federal courts have held that in Ohio 'express and unmistakable authority' was conferred on the city to make a contract, such as is involved here, and during the life of the contract the parties operating under it are bound by its terms."

This principle of the limitation of the power of the commission over rates fixed by contract in Ohio is again well expressed in the case of *Interurban R. & Terminal Co. v. Public Utilities Comm.*, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696, P. U. R. 1919B, 212: "Therefore the municipality does not get its authority from the legislature, but from the constitution. The legislature can not deprive it of that power. The constitutional provision referred to was not adopted until after the making of the contract involved in this case, and the validity of that contract is, of course, to be determined by the law in effect at the time it was

made. But inasmuch as under the authorities already cited the contract was valid and binding when made, we see no reason to deny to the municipality authority to insist upon its rights under the contract, now that its power to deal with the subject is sanctioned by the organic law. Moreover, we are not able to find that the legislature has attempted to confer upon the public utilities commission the authority to change rates fixed by contract between the company and local authorities."

The rate fixed by contract is subject to change by public utility commissions unless the power to fix rates is expressly and clearly given the city, for as the court said in *Woodburn v. Public Service Commission*, 82 Ore. 114, 161 Pac. 391: "In brief, the facts present a situation where the legal voters of the city amended their municipal charter and conferred upon the common council authority to grant franchises in the streets for public benefits; the council exercised this chartered power, and granted a franchise to a telephone company, the rates to be charged to be fixed by the terms of the franchise; subsequently the Public Utility Act was passed by the Legislative Assembly, and then referred to all the voters of the state, who approved the measure at a general election; and, finally, upon the application of the telephone company, the Public Service Commission, acting under the authority of the Public Utility Act, specified a schedule of rates to be charged by the telephone company, and the city is now complaining because those rates exceed the charges fixed in the franchise. The ultimate question for decision is whether the Public Service Commission was lawfully empowered to specify rates different from those fixed by the terms of the franchise.

* * * The right to regulate the rates to be charged by a public utility inheres in the power to govern. The regulation of rates for the purpose of promoting the health, comfort, safety, and welfare of society is an exercise of the police power, and is therefore an attribute of sovereignty. *Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. ed. 828, 14 Ann. Cas. 560; *Yeatman v. Towers*, 126 Md. 513, 95 Atl. 158; *Benwood v. Public Service Comm.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 22, 141 Pac. 1083. * * * If the franchise is deemed to be a contract between the city and telephone company, then the mere fact that it was made prior to the enactment of the public utility statute and before the state attempted to regulate the rates, does not debar the state from

increasing the rates fixed in the contract between the parties, for the reason that the law wrote into it a stipulation by the city that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power, it does not work an impairment of any obligation of the contract. The immediate parties to the franchise must contract with reference to the right of the government to exercise its inherent authority. The government can not, by contract, forestall the resuscitation of a dormant police power by the government; and therefore, unless the state actually divested itself of the right to exercise its police power, the agreement by which the city and company specified the rates was made subject to the right of the state to change them."

Under a franchise contract, calling for the payment of a fixed portion of the gross receipts under certain conditions, the city has a right of action independently of the question of the jurisdiction of the corporation commission, which is not concerned with this question, for as the court said in the case of *Huffaker v. Fairfax*, 115 Okla. 73, 242 Pac. 254: "The ordinance in question was simply a franchise ordinance, and the provision with reference to the payment to the town of a certain percentage of the gross receipts above a specified amount was a mere incident to the subject-matter of the ordinance. The defendant desired and obtained a franchise to operate a light plant, and was not endeavoring to get a revenue ordinance enacted by the town of Fairfax. Neither was the board of trustees attempting to enact revenue legislation. * * * The people of the town of Fairfax and the board of trustees granted the defendant a twenty-five-year franchise upon his own terms, and he is not in a position to deny the validity or sufficiency of the ordinance and proceedings awarding him the franchise in question. The ordinance here is simply a franchise ordinance whereby the applicant for the franchise proposed, if granted the franchise, that he would pay to the town of Fairfax one and one-half per cent of the gross receipts of his plant in the event his receipts exceeded \$5,000 per year. The record shows that he has rendered his statement showing his receipts exceeded that sum, and that he refuses to pay according to the agreement, thereby breaching the contract in question. The action is clearly one upon a contract, and, in our view, instituted in the proper court. * * * The corporation commission has made no order in the instant case, and until the commission acts with respect to rates the contract involved herein is in full force. * * * The question

of the jurisdiction of the corporation commission over public utilities, with power to fix and establish rates and to prescribe rules, requirements, and regulations affecting their services, operation, and the management and conducting of their business, is not involved in this case. The only question here to be determined is whether the municipality can recover the sum sued for under the contract freely and voluntarily entered into by the parties."

Under the provisions of the franchise contract requiring the consent of the municipality, under proper statutory authority for the abandonment or discontinuance of any part of the service, the railroad commission has no authority to authorize the discontinuance of service, for as the court said in the case of *Madison v. Railroad Commission*, 199 Wis. 571, 227 N. W. 10, P. U. R. 1930A, 499: "Section 193.11, Stats., relating to street railway corporations, provides, in part, as follows: 'Wherever such corporation has constructed its railway on any street or highway under a franchise granted to it by any town or village board or city council, such corporation shall not, during the term of such franchise, abandon or discontinue any part of such railway on a public street or highway within any town, village or city without the consent of the proper town or village board or city council.' In view of that provision, the Madison Railways Company can not lawfully abandon or discontinue railway service on Harrison and Regent streets without the consent of the city council of Madison. There is no statute conferring authority upon the railroad commission to order such abandonment or discontinuance. * * * The trial court properly concluded that the railroad commission had no authority to enter the orders in question. Its judgment vacating and setting aside those orders must be affirmed."

The courts of Virginia permit their state commission to determine the question of abandonment of service, where it had been rendered at a loss, because the continuance would amount to a confiscation of the property of the public utility, under the same authority which permits it to regulate rates and service. In holding that a finding of fact on this question by the commission is final, especially where the municipality offered no evidence to the contrary, the court said in the case of *Hampton v. Newport News & Hampton Railway, Gas & Electric Co.*, 144 Va. 29, 131 S. E. 328: "So recently has this identical question been so ably dealt with by the president of this court that a further discussion thereof would be but an effort upon our part to glean

over barren fields. In order, however, to preserve the continuity of the decisions on the subject, we quote with approval from the opinion in *Portsmouth v. Va. Ry. & P. Co.* (No. 1243), 141 Va. 44, 126 S. E. 366, decided January 15, 1925. * * * 'While we have never before had occasion to consider the authority of the commission to permit the discontinuance of facilities theretofore devoted by transportation companies to the public service, its jurisdiction to grant such permission is based upon the same reasons and supported by the same authorities as the power which is as plainly vested in it to prescribe rates and to require facilities to be maintained. It therefore seems unnecessary further to repeat these reasons or to cite any more cases than those to which we have already referred in this opinion.'

* * * It is also contended by the city that, although the commission had jurisdiction to determine the question of abandonment by the company of its street car lines, the proof fails to sustain the allegations of the petition that the company was operating at a loss, and a continuance of the service would therefore amount to a confiscation of its property. There is no merit in this contention. The company presented to the commission the evidence of its proper officers that the railway was being operated at a loss. The city offered no evidence in contradiction of that offered by the company. * * * While the commission had the power to order a valuation of all of the property of the company in order to determine whether or not it was operating at a loss, it was not obligatory upon the commission to do so. Passing upon the evidence before it, the commission was evidently convinced that the allegations of the petition were true. From this finding of fact we have no inclination to depart."

§ 214. **Paving under contract.**—That contracts for paving between rails will be enforced as made is clearly decided in the case of *Cleveland R. Co. v. Cleveland*, 97 Ohio St. 122, 119 N. E. 202, as follows: "The obligation to lay the new rails under the franchise is admitted by the railway company. When they discharge this obligation, how can it be contended that they are relieved from the obligation to keep the pavement in repair along and between the tracks, as to which they had already defaulted in the use of the old rails with a wornout block pavement adjacent thereto? This admission seems decisive of the case and the obligation of the railway company in connection with the new track by reason of its own admitted default in connection with the old track. Under the franchise it is self-evident that, whether the rails were old or new, it was the railway company's

duty to maintain them in repair during the life of the present pavement, and there being no complaint that the present pavement was in any wise inadequate for public travel, but, upon the contrary, had a future life perhaps of many years, the duty of the railway company to repair is undeniable. But if there were any doubt about the construction or application of this franchise to the admitted facts before us, again the city should prevail. In this day private interests and private rights must yield to public interests and public rights, and, where there is ambiguity or uncertainty as to which of two constructions should prevail in a franchise contract, it is quite clear that construction should be adopted by courts that would be most favorable to the public interest and welfare."

A municipality, having exclusive control over its streets by statutory authority expressly given, may require a street railway system to pave the space between and along its tracks uniformly with the balance of the street pavement and at its own expense under the decision in *Dallas R. & Terminal Co. v. Bankston* (Tex. Civ. App.), 33 S. W. (2d) 500, where the court expressed the rule as follows: "We are of the opinion, therefore, that the ordinances must be sustained as valid enactments under powers given cities to establish, improve, and regulate the use of its streets, to regulate the operation of street railways, to prohibit all acts detrimental to public health, safety, and welfare, and to preserve and enforce good government, order, and security of the city and its inhabitants. In view of the exclusive control given cities over their public streets by statute and the oft-repeated vindication of this power by courts, no serious contention can now be made that the city of Dallas was without authority to require the street railway company to pave the space between tracks and two feet on each side with material similar to that used in paving the streets, and to maintain the track rails on a level with the surface."

Under proper legislative authority, a municipality may require the street railway using its streets to pave between its tracks and to assess the cost of such pavement against its property and to hold a lien for such paving assessment. This right is recognized as belonging to the city although conferred by an amendment to its charter and carries the power of levy and sale, as is indicated in the case of *Georgia Power Co. v. Decatur*, 170 Ga. 699, 154 S. E. 268, where the court said: "That the General Assembly of this state has the power to authorize a municipality therein to pave its streets and to assess and enforce the cost

and collection of a special tax assessment against a street railway company whose tracks occupy its streets, and for the cost of paving the area occupied by its tracks and for a reasonable distance outside of its tracks located in a street ordered paved under such legislative authority, is established law. * * * The record discloses that for several years the street railway companies operating the railway system under said franchise in the municipality of Decatur have resorted to various efforts seeking to abrogate the terms of said rate contract without the consent of the municipality, and to surrender the franchise requiring the operation of said railway system, all of which efforts this court has held to be illegal, rendering therein repeated decisions adjudicating the validity and binding effect of said contract on the railway company, and requiring it to render the public service imposed upon it by said franchise. * * * If it were not for the existence of this rate-fixing contract, the railway company would have no cause to complain of a loss in operating expenses, as it could then do doubtless what it has already done in other cities wherein it operates street railways, viz.: apply to the public service commission of the state for authority to increase its fares over said line so as to permit such earnings thereon as would compensate it as a return on its capital investment and costs of operating expense, which necessarily includes the burden of a paving assessment against its property, which said commission would have the power to grant on proper showing. Code, section 2662 (8 Park's Supp. 1922, and Michie). It is worthy of notice that the record in this case shows that there has been an increase of travel over said line, resulting in an order of the public service commission requiring the inauguration of additional facilities to accommodate the traveling public during rush hours, while the court will take judicial cognizance of the large increase of population in the city of Decatur and its environments since the creation of the rate-fixing contract. Doubtless, were it not for the existence of the rate-fixing contract, the power company would find its line from Atlanta to Decatur to be one of the best paying divisions of its extensive railway system throughout the state. * * * The legislature, by virtue of said acts amending the charter of Decatur, expressly impressed all liens for paving assessed against street railway companies upon the said companies and all of their property located in said municipality, used in the operation of its street railway system there, which we think it had the power to do. * * * While the legislature has empowered the municipality

to impress its lien for the cost of the paving assessment ordered levied against the street railway company on all of its property in said city used by the company in operating its street railway system, and to issue an execution therefor to be collected by a levy and sale, yet it did not expressly authorize it to enforce its lien by a levy and sale of any particular part of its tracks. Without such express authority from the legislature, a levy and sale of a portion of said tracks would be in violation of the public policy of this state. In *Georgia Ry., &c., Co. v. Atlanta*, 144 Ga. 722, 87 S. E. 1058, 1059, *supra*, it was held: 'A segment of a street railway located on its own property, abutting on a street upon which public improvements have been made, and against which it is sought to enforce an assessment, is, in the absence of statutory authority, not liable to levy and sale, so as to carve a segment out of the railroad track upon which the levy is made.'

* * * We therefore hold that said paving assessment levied by the city of Decatur against the street railway company's property, under said legislative acts amending the charter of said city, is a binding lien upon all of the property of the Georgia Railway & Electric Co., owned by it within said municipality and used in the operation of its street railway system therein, under the facts of this case, at the time of the issuance of the execution therefor."

CHAPTER 11

DURATION OF FRANCHISE

Section

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§ 220. State can grant perpetual franchise if constitutional.

—Because the power of the state over all public highways, including the streets of municipalities, is supreme, a perpetual grant when made by the state of the privilege of using the streets or other highways for the purpose of furnishing municipal public utilities is clearly valid unless such a grant is in conflict with the constitution. Indeed, it must be axiomatic that, having supreme power to grant franchises creating a body corporate and at the same time having complete control over the use of all rural highways and streets which are necessary for the municipal public utility to enjoy its franchise rights and to provide its service, the state can grant to any company in perpetuity the exclusive right to own and operate a public utility in any particular locality in the absence of a constitutional limitation.

§ 221. **Municipal franchise not perpetual under implied power.**—The power of a municipal corporation, however, to grant special franchise privileges, as before stated, is necessarily limited by the power conferred upon it for that purpose by the state. And as the courts have consistently held that power to grant exclusive franchises will not be found in municipal corporations by implication nor that franchises granted by the municipality will by implication be found exclusive, it follows that the power of municipal corporations to grant perpetual franchises will not be found by implication nor will a franchise when so granted be construed as a grant in perpetuity by implication. To find that a perpetual franchise has been granted by a municipality, the power to grant such a franchise must first be found in the municipality and the intention to make such a grant must be clearly indicated in the franchise.

§ 222. **Construction against perpetual franchises.**—For the purpose of retaining in the municipal corporation the control of its streets and the furnishing of its public utility service the courts have refused to imply power in the municipality to grant perpetual franchises or by implication to find a franchise to be perpetual, for the same reason and to the same extent that they have consistently maintained that the power to grant exclusive franchises will not be found in municipalities by implication and that the franchise will not be treated as exclusive unless it was clearly so intended. Indeed, for the purpose of retaining the necessary control over the services rendered by municipal public utilities it is more necessary and important that the franchise be not perpetual, for such control must be provided if ever adequately in the franchise itself, than that the courts refuse to find by implication that exclusive franchise rights have been granted. For a perpetual franchise would of necessity in practically all cases mean an exclusive franchise as well, and the power to grant a franchise in perpetuity and thereby surrender all power of control, not provided for in the grant or expressly retained, is necessarily much greater than the power to grant a franchise for a limited period; and, of course, it is much more difficult accurately to anticipate changing conditions, which affect the cost of production, and new inventions and the opportunities they present of affording other conveniences for the city and its inhabitants as well as the future cost of supply and other essential matters of business administration and control for all time than for a fixed period.

§ 223. **Duration of municipal grants limited to retain control.**—In the light of past experience municipal corporations and their inhabitants have at times suffered great inconvenience and have been subjected to many disadvantages as the result of the granting, if not, indeed, the giving of franchises without cost or condition, or at least any adequate provision for the proper control over the service to be rendered and the rates to be paid therefor, because the municipal authorities making the grant failed fully to appreciate the future needs and opportunities of its citizens as well as the reduction in cost of the service on account of improved conditions resulting from new inventions and superior agencies for furnishing the service. Where, therefore, the period of duration of the franchise is not provided by its terms the courts, with a few exceptions, to be noted, have consistently held that the franchise period must be limited to that provided by the statutory authority vesting in the municipality the power to make the grant in any event, or if there is no period of limitation fixed by the legislature, the grant is limited to the life of the grantee or of the municipality granting it or to the easement or right of the public to use the streets for transportation, and that no franchise can be granted for an unreasonable period.

§ 224. **Duration not expressly fixed varies.**¹—The courts have formulated no definite rule defining the period of a franchise that is not fixed by its terms which is generally accepted by all of them. Different periods have been adopted in different jurisdictions, due perhaps for the most part to varying statutory provisions and to different constructions of the rule as applied to cases other than municipal public utilities; and as already suggested, a few decisions, including those concerning New York City, have held that in such cases the franchise granted must be held to be perpetual. In the latter cases it is well to remember that the title of the streets in New York City is in the city itself, and not, as is the general rule, in the abutting property owners who hold their title subject to the right or easement in the public to use them for the purpose of transportation and communication.

§ 225. **Duration fixed by discretion of municipality.**—The duration of the franchise granted so long as it is not perpetual is a matter for the determination of the municipal authorities,

¹ This section (§ 171 of 2d edition) quoted in *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250.

and in the exercise of their discretion they may fix it for such term as seems most expedient and advantageous to the municipality, except where otherwise provided by legislative authority, and except in cases of the clear abuse of such discretion in the granting of a franchise for an unreasonable period. Where the period is fixed the grant need not be limited to the life of the grantee as defined in its charter, and franchise grants have been upheld for periods equal to those permitted in the making of contracts for public utility service, which we have heretofore found may run for twenty-five, thirty, or even fifty years.

§ 226. **Duration of franchises defined.**—It is evident that the present practice of issuing “indeterminate permits” materially modifies and in many cases practically abrogates the rule formerly established as to the duration of franchises. A discussion of some of the leading decisions defining the various franchise periods in connection with the reasons given for their different limitations will assist in defining the principle as enunciated and applied in the different jurisdictions.²

² United States. *St. Clair County Turnpike Co. v. People of Illinois*, 96 U. S. 63, 24 L. ed. 651; *Blair v. Chicago, Illinois*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; *Des Moines City R. Co. v. Des Moines, Iowa*, 214 U. S. 179, 53 L. ed. 958, 29 Sup. Ct. 553; *Louisville, Kentucky v. Cumberland Tel. & T. Co.*, 224 U. S. 649, 56 L. ed. 924, 32 Sup. Ct. 572; *Detroit United Ry. v. Detroit, Michigan*, 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. 697; *Owensboro, Kentucky v. Cumberland Tel. & T. Co.*, 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. 988; *Boise Artesian Hot &c. Water Co. v. Boise City, Idaho*, 230 U. S. 84, 57 L. ed. 400, 33 Sup. Ct. 997; *Old Colony Trust Co. v. Omaha, Nebraska*, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. 967; *Owensboro, Kentucky v. Owensboro Water Works Co.*, 243 U. S. 166, 61 L. ed. 650, 37 Sup. Ct. 322; *Northern Ohio Trac. &c. Co. v. State of Ohio*, 245 U. S. 574, 62 L. ed. 481, 38 Sup. Ct. 196, L. R. A. 1918E, 865; *Denver, Colorado v. Denver Union Water Co.*, 246 U. S. 178, 62 L. ed. 649, 38 Sup. Ct. 278, P. U. R. 1918C, 640; *Mitchell, South Dakota v. Dakota Central Tel. Co.*, 246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. 362; *Cov-*

ington, Kentucky v. South Covington &c. St. R. Co., 246 U. S. 413, 62 L. ed. 802, 38 Sup. Ct. 376, 2 A. L. R. 1099; *Detroit United R. v. Detroit, Michigan*, 255 U. S. 171, 65 L. ed. 570, 41 Sup. Ct. 285; *Bankers Trust Co. v. Raton, New Mexico*, 258 U. S. 328, 66 L. ed. 642, 42 Sup. Ct. 340; *Ohio Public Service Comm. v. State of Ohio*, 274 U. S. 12, 71 L. ed. 898, 47 Sup. Ct. 480; *Fort Smith Light &c. Co. v. Board of Improvement of Paving Dist.*, 274 U. S. 387, 71 L. ed. 1112, 47 Sup. Ct. 595; *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150, P. U. R. 1929A, 433.

Federal. Detroit, Michigan v. Detroit City R. Co., 56 Fed. 867; *Levis v. Newton, Iowa*, 75 Fed. 884, *affd.* in 79 Fed. 715; *Louisville Trust Co. v. Cincinnati, Ohio*, 76 Fed. 296, *writ of cert. denied* in 164 U. S. 707, 41 L. ed. 1183, 17 Sup. Ct. 995; *Logansport R. Co. v. Logansport, Indiana*, 114 Fed. 688, *appeal dis.* in 192 U. S. 604, 48 L. ed. 584, 24 Sup. Ct. 851; *Boise City Artesian Hot and Cold Water Co. v. Boise City, Idaho*, 123 Fed. 232; *Sioux Falls, South Dakota v. Farmers Loan &c. Co.*, 136 Fed. 721; *Mercantile Trust Co. v. Denver,*

Colorado, 161 Fed. 769, mod. in 201 Fed. 790; Omaha Elec. Light & Co. v. Omaha, Nebraska, 179 Fed. 455, revd. on bill of review in 216 Fed. 848, appeal dis. in 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. 974; Boise City, Idaho v. Boise Artesian Hot & C. Water Co., 186 Fed. 705, cert. denied in 220 U. S. 616, 55 L. ed. 611, 31 Sup. Ct. 720, dis. in 230 U. S. 98, 57 L. ed. 1409, 33 Sup. Ct. 1003; Des Moines Water Co. v. Des Moines, Iowa, 206 Fed. 657; City Water Co. v. Chillicothe, Missouri, 207 Fed. 503, cert. denied in 231 U. S. 753, 58 L. ed. 467, 34 Sup. Ct. 322; Ashland Elec. Power & C. Co. v. Ashland, Oregon, 217 Fed. 158; Columbus R., Power & C. Co. v. Columbus, Ohio, 253 Fed. 499, affd. in 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1648, P. U. R. 1919D, 239; Jamestown, New York v. Pennsylvania Gas Co., 263 Fed. 437, P. U. R. 1920E, 379, mod. in 1 Fed. (2d) 871; Gas & C. Securities Co. v. Manhattan & C. Trac. Corp., 266 Fed. 625, dis. in 262 U. S. 196, 67 L. ed. 946, 43 Sup. Ct. 513; Louisville, Kentucky v. Louisville R. Co., 281 Fed. 353, P. U. R. 1923B, 759; Westinghouse Elec. & C. Co. v. Denver Tramway Co., 3 Fed. (2d) 285; Denver, Colorado v. Denver Tramway Corp., 23 Fed. (2d) 287; Security Trust Co. v. Grosse Pointe, Michigan, 32 Fed. (2d) 706; Hamill v. Hawks, 58 Fed. (2d) 41.

Alabama. Mobile Elec. Co. v. Mobile, 201 Ala. 607, 79 So. 39, L. R. A. 1918F, 667.

Florida. State v. Pinellas County Power Co., 87 Fla. 243, 100 So. 504.

Illinois. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; People v. Central Union Tel. Co., 232 Ill. 260, 83 N. E. 829; People v. Commercial Tel. & T. Co., 277 Ill. 265, 115 N. E. 379, P. U. R. 1917D, 704; Sullivan v. Central Illinois Public Service Co., 287 Ill. 19, 122 N. E. 58.

Indiana. Hester v. Greenwood, 172 Ind. 279, 88 N. E. 498; Greensburg Water Co. v. Lewis, 189 Ind. 439, 128 N. E. 103, P. U. R. 1922E, 525; Chicago Lake Shore & C. R. Co.

v. Guilfoyle, 198 Ind. 9, 152 N. E. 167.

Iowa. State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437; State v. Iowa Tel. Co., 175 Iowa 607, 154 N. W. 678, Ann. Cas. 1917E, 539; Sac City v. Iowa Light, Heat & C. Co., 203 Iowa 1364, 214 N. W. 571; Hess v. Iowa Light, Heat & C. Co., 207 Iowa 820, 221 N. W. 194, P. U. R. 1929A, 22.

Kansas. Wilson v. Weber, 101 Kans. 425, 166 Pac. 512, P. U. R. 1917F, 667; Kansas Elec. Utilities Co. v. Bowersock, 109 Kans. 718, 202 Pac. 92; Wichita v. Wichita Gas Co., 126 Kans. 764, 271 Pac. 270.

Kentucky. Somerset v. Smith, 105 Ky. 678, 49 S. W. 456; Schaff v. La Grange, 176 Ky. 548, 195 S. W. 1097; Potter Matlock Trust Co. v. Warren County, 182 Ky. 840, 207 S. W. 709; Hamilton v. Bastin Bros., 188 Ky. 764, 224 S. W. 430; Truesdale v. Newport, 28 Ky. L. 840, 90 S. W. 589.

Louisiana. Johnson v. Natchitoches, 14 La. App. 40, 129 So. 433.

Massachusetts. Natick Gas Light Co. v. Natick, 175 Mass. 246, 56 N. E. 292; New England Tel. & T. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835; Boston Elec. Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346.

Michigan. Wyandotte Elec. Light Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821; Sullivan v. Bailey, 125 Mich. 104, 83 N. W. 996; Peck v. Detroit United Ry., 180 Mich. 343, 146 N. W. 977; Lansing v. Michigan Power Co., 182 Mich. 400, 150 N. W. 250; North Michigan Water Co. v. Escanaba, 199 Mich. 286, 165 N. W. 847; Bay City v. Saginaw-Bay City R. Co., 207 Mich. 419, 174 N. W. 193; Benton Harbor v. Michigan Fuel & C. Co., 250 Mich. 614, 231 N. W. 52.

Minnesota. State v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; Reed v. Anoka, 85 Minn. 294, 88 N. W. 981; State v. Duluth St. R. Co., 128 Minn. 314, 150 N. W. 917.

Missouri. Carthage v. Public Service Comm., 303 Mo. 505, 260 S. W.

§ 227. General or special franchise of state may be perpetual.—The case of *Louisville, Kentucky v. Cumberland Tel. & T. Co.*, 224 U. S. 649, 56 L. ed. 934, decided in 1912, contains a good statement of the principle that the state itself may grant a municipal public utility a perpetual franchise, including not only the right to be a body corporate, but to own and maintain a public utility within a municipality. This case decides that the municipality, having given its consent to the use of its streets for such municipal public utility by ratifying and confirming the statute creating the corporation and granting the consent of the state to own and operate a public utility as such, the right became vested in the municipal public utility in perpetuity, although no time for its duration was fixed expressly in the charter. The court, recognizing the size of the investment and the permanency of the improvements necessary to own and operate a general telephone system, held such right could not be terminated or impaired by subsequent action or objection on the

973; *State v. West Missouri Power Co.*, 313 Mo. 283, 281 S. W. 709.

New Jersey. Suburban Elec. Light & Co. v. East Orange Township, 59 N. J. Eq. 563, 41 Atl. 865; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619.

New York. People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; *People v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *Blaschko v. Wurster*, 156 N. Y. 437, 51 N. E. 303; *Weedsport Elec. Light Co. v. Weedsport*, 220 N. Y. 386, 115 N. E. 986; *Stillwater v. Hudson Valley R. Co.*, 255 N. Y. 144, 174 N. E. 306; *People v. Public Utilities Comm.*, 255 N. Y. 232, 174 N. E. 637, P. U. R. 1931B, 168; *Manhattan Bridge Three-Cent Line v. New York*, 204 App. Div. 89, 198 N. Y. S. 49.

Ohio. Cincinnati Gas Light & Co. v. Avondale, 43 Ohio St. 257, 1 N. E. 527; *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127; *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332; *Oak Harbor v. Public Utilities Comm.*, 99 Ohio St. 275, 124 N. E. 158, P. U. R. 1919F, 608; *Mt. Vernon v. Berman*, 100 Ohio St. 1, 125 N. E. 116; *Newcomerstown v. Consolidated Gas Co.*, 100 Ohio St.

494, 127 N. E. 414, P. U. R. 1920E, 342; *St. Clairsville v. Public Utilities Comm.*, 102 Ohio St. 574, 132 N. E. 151, P. U. R. 1921E, 459; *State v. Ohio Elec. Power Co.*, 35 Ohio App. 481, 172 N. E. 615, *affd.* in 121 Ohio St. 235, 167 N. E. 877.

Oklahoma. Okmulgee v. Okmulgee, 140 Okla. 88, 282 Pac. 640, P. U. R. 1930B, 65; *Cushing v. Consolidated Gas Utilities Co.*, 141 Okla. 82, 284 Pac. 38; *In re Consolidated Gas Utilities Co. (Okla.)* 11 Pac. (2d) 473.

Oregon. Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. 864; *Newsom v. Rainier*, 94 Ore. 199, 185 Pac. 296.

Texas. Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679.

Vermont. Barre v. Perry, 82 Vt. 301, 73 Atl. 574.

Virginia. Commonwealth v. Portsmouth Gas Co., 132 Va. 480, 112 S. E. 792.

Washington. Seattle v. Columbia & Co. R. Co., 6 Wash. 379, 33 Pac. 1048; *Burkheimer v. Seattle (Wash.)*, 299 Pac. 381.

Wisconsin. Central Wisconsin Power Co. v. Wisconsin Tract, Light, Heat & Co., 190 Wis. 557, 209 N. W. 755, P. U. R. 1927A, 76.

part of the city, for as the court said: "But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the state of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified, or forfeited by any ordinance of a general council. * * * Inasmuch, therefore, as the charter of the Ohio Valley Telephone Company was granted and as the exchanges were in operation before the adoption of the constitution, that company's rights are expressly preserved by the organic law of the state. * * *

In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. * * *

With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid many additional conduits, and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city³ from claiming that the ordinance was inoperative, and it also prevented the council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company. * * *

None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the state of Kentucky, the grant of an assignable right to use the streets of a city which remains the same legal entity, although by later statute it has been put in the first class and given greater municipal powers.⁴ In considering the duration of such a franchise it is necessary to consider that a telephone system can not be operated without the use of poles, conduits, wires, and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at

³ Boone v. Burlington &c. River R. Co., 139 U. S. 684, 35 L. ed. 319, 11 Sup. Ct. 687.

⁴ Vilas v. Manila, Philippine Islands, 220 U. S. 345, 55 L. ed. 491, 31 Sup. Ct. 416.

will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city, and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter can not be supported, either from a practical or technical standpoint. This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event; but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual, and none of which could be exercised without this essential right to use the streets."

§ 228. Power of state and municipality to grant perpetual franchise distinguished.—The case of *Boise City Artesian Hot & Cold Water Co. v. Boise City, Idaho*, 123 Fed. 232, decided in 1903, clearly distinguishes between the power of the state to grant a perpetual franchise and the construction of a franchise grant by the state, and the power vested in a municipality and the construction of a municipal grant in holding that in the one case the grant may be made or construed as perpetual, while in the other it will not be so construed unless the municipality had the power to make such a grant and it did so expressly, for it would not be found by implication. The court indicates that while the constitutional limitations in most of the states would prohibit such a municipal grant, even in the absence of such a limitation the municipality has no such power. Its grant must be limited to a reasonable period in order that it may not disable itself from exercising the control vested in it by surrendering its power of control, for as the court said: "There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the state. * * * No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. * * * In the constitutions of nearly all the states

it is provided that no exclusive or perpetual franchises shall be granted, and irrespective of such constitutional limitations, it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets.

* * * There can be no doubt that under this provision of its charter the city had the power to grant the use of its streets for a fixed reasonable period of time, either to an individual or to a corporation, for the purpose of furnishing a water supply to the inhabitants. It had no authority, however, to make a perpetual contract. A municipal corporation intrusted with the power of control over its public streets can not, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the legislature."

§ 229. Perpetual franchise generally also exclusive.—In the case of Omaha Electric Light & Power Co. v. Omaha, Nebraska, 179 Fed. 455, decided in 1910, it was contended that because the grant of the franchise was absolute in form and contained no limitation upon its duration it constituted a grant in perpetuity, while the municipality insisted that it did not have the power to grant a perpetual franchise and that it did not attempt to make such a grant. The court in construing the power of the municipality in harmony with the position maintained by it, said: "Applying this rule to the present case, we are of opinion that the conference of power in general terms to 'provide for lighting the streets' or 'to care for and control the streets' is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. That is a servitude not embraced within the ordinary control over streets usually given to municipalities. A perpetual franchise, even if not exclusive in fact, becomes largely so by the advantage in the race which preoccupation of the field and perpetual right to continue in it afford. And, while it may not be technically obnoxious to the constitutional prohibition against 'granting special privileges or immunities,' it is so unusual and extraordinary as to require, in our opinion, a more specific legislative authorization than the general language relied on by the company therefor. We therefore conclude that, even if the mayor and council had intended to grant a perpetual franchise to the company, they were powerless to do so."

On a further appeal this court in the case of Omaha Electric & Power Co. v. Omaha, 216 Fed. 848, said: "The * * * or-

dinance confers a perpetual franchise upon the plaintiff and authorizes it to distribute current for heat and power, as well as light, and directs that court to issue an injunction restraining the city from interfering with those rights." The opinion follows the rule expressed in the case of Old Colony Trust Co. v. Omaha, Nebraska, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. 967, to the effect that "the ordinance granted a perpetual franchise."

§ 230. **Duration as limited to life of grantor or grantee.**— That the period of limitation is fixed by the life of the municipality itself so that when the municipality is annexed to another the franchise rights granted by it are thereby terminated, is the rule established in the state of Illinois and sustained by the Supreme Court of the United States. In the case of People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245, decided in 1906, the court refused to accept the position taken by the defendant, which insisted on its right to continue under the franchise granted by a municipality which had been annexed to the city of Chicago, although the period of the franchise was not fixed, and said: "The ground of defendant's claim that the ordinance does not limit its charges in the annexed territory is that before the annexation the minor municipalities had granted to it the right to occupy the streets therein for its business without any limit as to time. If the grants had been for terms of years under legislative authority authorizing them, and the terms had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city because they had become binding contracts under which the defendant had vested contract rights for such terms. But they were not for definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service to the town or village hall or the village authorities free or for some reduced rate. Such grants can not be construed to be perpetual, and at most can not extend beyond the lives of the corporations granting them. Upon annexation, there ceased to be any town or village authorities entitled to the benefits of the contract or authorized to demand or receive them, and it could not have been understood that the grant should continue discharged of the obligation annexed to it. * * * The ordinances of the city extended over the annexed territory immediately upon annexa-

tion,⁵ and the limitations of the ordinance applied to the annexed territory. * * * To construe the ordinance otherwise would be to say that whenever any improvement is made in the service, the defendant may rid itself of all its obligations with respect to rates and still enjoy the grant—may retain the benefits and escape the burdens of the contract. * * * Under the ordinance, the defendant can not be required to adopt improvements in the service or equipment or to keep up with the general progress in the business, but if it sees fit to adopt improvements and furnish a better grade of telephone service, it can only have the benefit of the ordinance granting it the right to use the public streets by complying with the terms of the ordinance and not increasing the rates.”

To the same effect a franchise which is unlimited in terms is held to expire with the charter of the public utility holding it, in the case of *North Michigan Water Co. v. Escanaba*, 199 Mich. 286, 165 N. W. 847: “We think that the better doctrine is that the mere granting of a franchise does not amount to an implied contract on the part of the grantor, that it will do nothing to impair its value, or that it will not grant a rival franchise to a competing company, or enter into competition itself in reference to the subject of the franchise. * * * Without quoting further from the authorities cited by counsel, we must conclude that the rights of the original company to conduct waterworks were not perpetual, and expired with its charter; and the rights of the plaintiff are no greater than were those of the original company.”

To the same effect the court in the leading case of *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250, said: “The legislature of 1905 had authority to grant the use of the streets and public highways, whether in cities or in the country, to public utility corporations, with or without restriction of time of enjoyment, and the legislature at that session, either purposely or thoughtlessly, made the grant without fixing any period of enjoyment. This court must assume that the legislature was aware of the law upon the subject of that kind of a grant, and the court is powerless in the premises and can not supply or fix any period of the time of enjoyment, except that of the life of the corporation. It was not necessary for the legislature to fix the period of the enjoyment of the grant of use of the streets,

⁵ *Illinois Central R. Co. v. Chicago*, Illinois, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. 509.

unless it was desired to limit the enjoyment to a less period than the life of the corporation. In the absence of a declaration of a period during which the right might be enjoyed, it is the law in this state that it may be enjoyed for the period of the statutory life of the corporation."

The duration of a franchise will not be extended by an extension of the life of the public utility to which it has been granted, for as the court said in the case of *State v. Duluth St. R. Co.*, 128 Minn. 314, 150 N. W. 917: "The grant to the company was 'during the terms of its charter.' The company was incorporated on October 17, 1881. The court found that its franchise expired on October 17, 1931. Since its incorporation its corporate existence has been extended by the amendment of its articles to 50 years from July 1, 1908. The amendment did not result in an extension of the franchise. The street railway company has a valid franchise, granted by the act of 1881, exclusive in character, the provisions of which are subject to construction as occasion arises, and such franchise is at an end on October 17, 1931."

While a franchise granted "for and during the existence of said corporation" may properly be confined to the life of the grantee, it will be continued by an extension of the existence of the public utility holding such a franchise. This is the effect of the decision in the case of *Owensboro, Kentucky v. Owensboro Waterworks Co.*, 243 U. S. 166, 61 L. ed. 650, 37 Sup. Ct. 322, as follows: "Whether the plaintiff now has a franchise from the city turns chiefly upon the construction and effect of the Ordinance of June 3, 1889. By it the city then said that 'the franchise and license' to maintain, complete, and operate waterworks in the city and to use its public highways for that purpose 'are hereby granted to the Owensboro Waterworks Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation.' * * * In apt words its first section not only grants a franchise to the plaintiff, but makes the life of the franchise coextensive with the plaintiff's existence; and we find nothing in the ordinance which suggests that the words fixing the duration of the franchise are to be taken as comprehending anything less than the full corporate existence of the plaintiff. The right to extend its existence beyond the primary term was given by statute and expressly reserved in the articles of association, and so it is reasonable to believe that had there been a purpose to limit the franchise to that term it would have been plainly expressed, as was done in

the ordinance of 1878. The reasonable implication from the inclusion of such a limitation in the earlier ordinance and its omission from the later one is that the franchise granted by the latter was not to be thus limited. Of the suggestion that, under this view, the franchise may be made perpetual by repeated extensions of the plaintiff's corporate life, it is enough to say that we are here concerned with but a single extension already effected. The statute permitting such extensions may not be in force when the present twenty-five-year period expires, and, if it be in force, nothing may be done under it. * * * The plaintiff's franchise, as before shown, was granted June 3, 1889, and, of course, did not expire September 10, 1903. What did expire on that day was the contract made September 10, 1878, whereby the city agreed to rent and pay for the hydrants for the term of twenty-five years from that date. It is plain, therefore, that what was intended by the word 'franchise' in the seven ordinances was that contract."

§ 231. Duration limited to life of grantee—Right to control use.—The importance of retaining control in the municipality, which is the justification for the position of the court in refusing to imply that a municipal grant was intended to be perpetual, is well expressed in the case of *People v. Central Union Tel. Co.*, 232 Ill. 260, 83 N. E. 829, decided in 1908, where the court said: "It can not be thought for one moment that the parties contemplated a continued occupation of the streets if the posts should be so placed and the wires upon them should be kept at such an elevation as to be dangerous to the public in the use of the streets and alleys or that the city should be relegated to the slow process of some proceeding to compel compliance with the conditions. The city had no power to abdicate its functions in respect to the streets and bind itself by an ordinance to permit the continued enjoyment of the license in violation of its terms or the continuance of a public nuisance. It is of the utmost importance to the public that there should be in the city, charged with public duties, some immediate and effective power to insure compliance by the defendant with the terms of the license, and surely the defendant would not be permitted to occupy the streets without complying with the conditions of the ordinance, or to stand in defiance of the city, and insist that some other proceedings should be begun, which after long delays might result in compelling obedience to the conditions, permitting the public safety to be endangered or the public right delayed in the meantime. * * * The constitutional question

must be determined against the people. The argument is that the ordinance is in conflict with section 14 of article 2 of the Constitution, as making an irrevocable grant of special privileges and immunity, and is answered by numerous decisions of this court, the first of which was *Chicago City Railway Co. v. People*, 73 Ill. 541. The grant is not for any definite time, but is for the life of the corporation and limited to that time,⁶ and the city reserved the right to grant to any other company or person like permission for the use of the streets. * * * The license was not at the will of the city and revocable at its pleasure, and the council could not repeal it so long as the defendant complied with its conditions."

§ 232. Duration of franchise strictly construed against grantee.—In the leading case of *Blair v. Chicago*, Illinois, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427, decided in 1906, the Supreme Court of the United States sustained the position of the Supreme Court of Illinois to the effect that where the terms of the grant are not clearly expressed or where the intention of the legislature is ambiguous, they must be strictly construed against the grantee and the power not expressly or clearly granted should be withheld. The court in the course of its decision said: "What, then, was conferred in the franchise granted by the state? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the state is of no practical value until supplemented by the consent and authority of the council of the city. * * * Considering the act as a whole, it has the effect to extend the life of the corporations to ninety-nine years and to authorize the use of the streets of Chicago, with the consent and upon terms agreed upon with the council, and this right may be acquired in like manner during the extended life of the corporations for such periods as may be contracted for. Contracts already made are affirmed as made. * * * A construction can be given it which would extend all the contracts with the city for the term of ninety-nine years. On the other hand, it can be maintained, with at least equal force, that, notwithstanding the governor's view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of twenty-five years, for which they expressly stipulated. It must be, therefore, uncer-

⁶ *St. Clair County Turnpike Co. v. People*, 82 Ill. 174, *affd.* in 96 U. S. 63, 24 L. ed. 651.

tain whether the legislators voted for this act upon one construction or the other. It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

§ 233. **Duration to life of grantee similar to grant of life estate.**⁷—That the grant will be limited to the life of the grantee or to the period of its existence as fixed in its charter was first established by the Supreme Court of the United States in the case of *St. Clair County Turnpike Co. v. People of Illinois*, 96 U. S. 63, 24 L. ed. 651, decided in 1878, and since recognized as a leading case, in which the court compared the grant of the franchise to the grant of an estate in land and by analogy held that the period of the grant like the giving of a life estate in real estate terminated with the life of the grantee in the absence of anything in the grant fixing a period definitely. The court said: "At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. In the present case, the Turnpike Company was created to continue a corporate body only for the term of twenty-five years from the date of its charter; and although, by necessary implication, a further continuance, with the special faculty of holding and using the turnpike authorized by the act until redeemed by the state, is given to it for that purpose, yet it is only by implication, arising from the necessity of the case, and, therefore, can not be extended to other purposes and objects. Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public. We think the Supreme Court of Illinois con-

⁷ This section (§ 180 of 2d edition) quoted in *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250.

strued the grant liberally in this case, when it declared 'the fair construction' to be, that it was designed the corporation should have the use of the bridge and dike, with the right to take tolls thereon, until the period fixed for the determination of its existence; and we think that that period can not be extended by implication beyond the prescribed term of twenty-five years, except for the purposes contained in the charter."

The principle limiting the duration of the franchise to the life of the corporation to which it is granted, which was established by the Supreme Court of the United States in the case of *St. Clair County Turnpike Co. v. People of Illinois*, 96 U. S. 63, 24 L. ed. 651, *supra*, has been adopted by the Supreme Court of Michigan in connection with municipal public utilities, for as the court in the case of *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821, decided in 1900, said: "An incorporation under this act, a petition to the city to erect poles and wires, or for a franchise for that purpose, and the grant of the same by the city, would make a contract binding for the life of the corporation. It would be immaterial that no time for the existence of the right or the franchise was specified. The grant in such case would be limited to the period of existence fixed by the charter."

§ 234. **Duration of franchise and service contract same.**—The same court in the later case of *Sullivan v. Bailey*, 125 Mich. 104, 83 N. W. 996, decided in 1900, states more fully the reason for its adhering to the rule limiting the duration of the grant to the period of the corporate life of the grantee and applies the doctrine of the rule of strict construction by refusing to find power in the municipality to grant a franchise for a longer period than it had power to make a contract for municipal public utility service. In the course of its opinion the court said: "It is manifest that the legislature recognized the evils that had come to municipal corporations by granting the use of the streets for so long a period. The evident purpose, therefore, in granting this charter was to leave the control of the streets, at the expiration of the ten years, entirely within the power of the common council. It is urged that neither persons nor corporations will make so large an investment if all their rights to the use of the streets cease at the end of ten years. * * * It seems to me that such result could not have been contemplated by the legislature, and that the language of sections 8 and 11 is a clear limitation upon the power of the common council to grant any franchise for furnishing light and water beyond the ten years. * * *

The word 'contract,' as used in the charter, in my judgment, means the same as the word 'franchise.' When a franchise is proposed, it defines the terms of its existence, and its acceptance completes the franchise or contract. Until the action of the council is accepted, there is no franchise or contract."

This same principle is recognized, if not expressly applied, in the case of *Mercantile Trust Co. v. Denver*, Colorado, 161 Fed. 769, decided in 1908, where the court said: "A large part of the argument was directed to the question as to the length of term of the easement—the complainant contending that it is in perpetuity. The ordinance does not, in express words, fix the term of the easement granted. And while the defendant made some claim that the ordinance gave a mere revocable license, that position can not be sustained. The defendants also cited authorities to the effect that * * * the easement should be construed to extend during the term of the life of the grantee.^a The defendant's insistence on the doctrine of these cases appeared as a concession that the rights of the street car company under the ordinance of 1885, * * * will not expire until February 5, 1935; and if such concession be not made, the rights granted to it must extend, under the authorities, at least to that time. This being true, it becomes immaterial, for the purposes of this case, to determine whether the easement is in perpetuity. Until that time in 1935 has been reached it is a moot question whether its rights under the ordinance extend beyond February 5, 1935."

On a further appeal this court in the case of *Denver v. Mercantile Trust Co.*, 201 Fed. 790, said: "It is a valid contract as to all streets which are actually occupied or in contemplation of occupancy, pursuant to a system adopted with a view of completion in the immediate future."

The case of *Logansport R. Co. v. Logansport*, 114 Fed. 688,^a decided in 1902, in construing the power conferred upon this municipality of Indiana "to give consent upon such terms and conditions as the common council may see fit," in connection with the grant of a special franchise, held that "it was ultra vires of the common council to surrender its control of the streets of the city in perpetuity to the complainant."

The court in the case of *Detroit, Michigan v. Detroit City R. Co.*, 56 Fed. 867, decided in 1893, by way of reply to the argu-

^a *St. Clair County Turnpike Co. v. People of Illinois*, 96 U. S. 63, 24 L. ed. 651; *Louisville Trust Co. v. Cincinnati, Ohio*, 76 Fed. 296; *Virginia Canon Toll-Road Co. v. People*, 22

Colo. 429, 45 Pac. 398, 37 L. R. A. 711.

^a Appeal dismissed in 192 U. S. 604, 48 L. ed. 584.

ment that it would be impossible to secure the investment required to install a municipal public utility if the right to continue its use were revocable, said: "The right of a city council, under its general control of the streets, to grant an irrevocable easement for the laying of tracks and running of cars, has several times been considered by courts of last resort in this country, and the great weight of authority is in favor of the view that such power does not include authority to convey a vested right in the streets for years, or in perpetuity. * * * An inevitable limitation thus arising is that the easement shall not endure beyond the life of the franchise, for which the easement is given. I can not escape the conclusion, which seems to me clear to a demonstration, that the power of consent to be exercised by the city under the statute is limited in time to the life of the franchise to be consented to. The acts of the state and city, together, in granting the franchise, and consenting to its exercise, are equivalent to the grant of a franchise by a state legislature, under a constitution which permits it, to a company to lay its railway in certain named streets of a city and to operate the same, without the intervention of the city in the matter."

The period expressly fixed in the franchise is controlling if made by the city under proper authority and may not be changed by either party thereto, for as the court said in the case of *Columbus R. Light & Power Co. v. Columbus, Ohio*, 253 Fed. 499, P. U. R. 1919B, 249:¹⁰ "The primary and controlling question, in my opinion, depends on the nature of the relation created between the complainant and the city by these franchise grants. This relation is settled beyond controversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States. * * * The law as settled by these cases is that the legislature has by these sections delegated to municipal corporations full power and authority to enter into contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding twenty-five years, and for a fixed rate of fare to continue during the term of such grants, may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term, with a rate of fare to endure during that term,

¹⁰ Affirmed in 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1648, P. U. R. 1919D, 239.

and this ordinance is accepted, expressly or impliedly, a contract is engendered mutually binding and unalterable, except by the consent of both parties, during the term thereof."

§ 235. **Duration of franchise not fixed, optional.**—The principle of refusing to find by implication the power in municipal corporations or their intention, as expressed in the terms of the franchise, to grant the special privileges covered by the franchise in perpetuity is clearly enunciated by the Supreme Court of Ohio in the case of *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332, decided in 1909, where the court held that a franchise which does not fix the period of its duration is revocable by either party. In the course of its decision the court said: "It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not prepared to hold that the company has thus acquired such a perpetual franchise, and we feel quite sure that even the defendant in error, on more mature reflection, would not insist on such a conclusion. * * * It comes, then, to this: That, in the absence of limitations as to time, the termination of the franchise is indefinite, and to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto. * * * The city can not directly or indirectly deprive the gas company of its property without due process of law when the latter withdraws from the further exercise of its franchise, *Cleveland Electric R. Co. v. Cleveland, Ohio*, 204 U. S. 116, 51 L. ed. 390, 27 Sup. Ct. 202."

This principle and authority were fully sustained and extended in the case of *Newcomerstown v. Consolidated Gas Co.*, 100 Ohio St. 494, 127 N. E. 414, P. U. R. 1921B, 669, as follows: "The passage of the first ordinance and its acceptance by the company constituted a contract between the parties. It was binding upon the parties as to the things specifically stated in it, but, as the duration of the franchise was not fixed by the terms of the contract, its duration is indeterminate, existing only so long as the parties mutually agree thereto. *East Ohio Gas Co. v. City of Akron*, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332. * * * It follows from what we have said that there is no binding contract between the village and the company for any determined period and either party is at liberty at any time to terminate the contract."

The general principle permitting the municipality to exercise its discretion in fixing the period of duration of the franchise, as well as its other terms, provided, however, that no perpetual grant could be made is well expressed in the case of *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679, decided in 1892, where the court said: "In reference to the second proposition submitted by the appellants, we hold that, as the common council had legislative authority to grant the franchise in question, its duration was a matter for their exclusive determination. Whether it should be extended for two, five or thirty years was left to their wisdom and discretion. They could not, perhaps, abandon or transfer their ordinary control over the streets of a legislative character, so as to prevent the proper and legitimate exercise of this authority by their successors in office. But this, as we have seen, they did not do. Nor was it in the power of the common council to create a perpetuity. Subject to these limitations, however, the wisdom and reasonableness of the grant, and the length of time during which it should continue, were addressed solely to the good judgment of the members of the common council."¹¹

To a similar effect is the holding of the court in the case of *State v. Pinellas County Power Co.*, 87 Fla. 243, 100 So. 504, that the grant for a period of ninety-nine years does not render the franchise void because for an unreasonable length of time nor require a holding to that effect, although less than thirty years of that period have elapsed. As the court said: "In some jurisdictions the period for which such franchise may be granted is fixed by constitution or statutory or charter provision. * * * But the numerical weight of authority seems to be that a franchise granted by a municipality without limit of duration will not be construed to be in perpetuity."

Where the duration of a franchise is for an unlimited time, it is not subject to termination at the will of the grantor under the ruling of the Supreme Court of the United States in the case of *Ohio Public Service Comm. v. State of Ohio*, 274 U. S. 12, 71 L. ed. 898, 47 Sup. Ct. 480, where the court said: "The ordinance of February 1, 1892, ordained—'Sec. 1. That Aurel P. Gans and Mellville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys, and avenues of the village of Orrville for the purpose of erecting, maintaining and operating electric

¹¹ Dillon, *Mun. Corp.* (5th ed.),
§ 95.

light wire mains and apparatus complete for the distribution of electricity for light, heat and power.' * * * We think it quite clear that the conclusions of the court below conflict with rulings heretofore announced by this court. In *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574, 62 L. ed. 481, L. R. A. 1918E, 865, 38 Sup. Ct. 196, we pointed out the state of the law in Ohio during 1892. It is plain enough from what was there said that in our view the franchise originally granted by the village of Orrville was for an unlimited time and not subject to termination at the mere will of the grantor. * * * If to enforce the Ohio statute of 1896 would destroy this right, it conflicts with the provision of the federal Constitution—No state shall pass any law impairing the obligation of contracts. The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

§ 236. **Franchise for excessive period entirely void.**—The Supreme Court of Kentucky in the case of *Somerset v. Smith*, 105 Ky. 678, 49 S. W. 456, decided in 1899, made one of the most exacting applications of the rule of strict construction in holding invalid the renewal of a franchise for the maximum period permitted by the constitution because the beginning of such renewal period was postponed to a date subsequent to the time of its ratification. The court in the course of its decision said: "By section 164 of the Constitution it is provided: 'No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years.' It is contended that this contract is void, because in conflict with this constitutional provision. In this we concur. The franchise or privilege is said to be for only twenty years from its beginning, and that it begins when the present contract expires or is terminated. The present contract expires in 1900, and although it is provided that this privilege or franchise may begin before that date, and then extend only twenty years, yet the contract made is for more than twenty years, as it did not begin on the day of the ratification of the contract but it is expressly postponed to some future date. Whatever may be said about the franchise, this is certainly a contract in reference to a franchise, and the term contracted for exceeds the constitutional limit."

In granting a franchise without limitation as to time the court in holding that the city in effect attempted to grant it in perpetuity and that its action was without authority and void, in the

case of *Newsom v. Rainier*, 94 Ore. 199, 185 Pac. 296, spoke as follows: "It will be observed that no limitation of time is contained in the enactment, but it will continue so long as the grantees comply with its terms. This constitutes a plain perpetuity within the meaning of *City of Joseph v. Joseph Waterworks Co.*, 57 Ore. 586, 111 Pac. 864, 112 Pac. 1083. The court there, speaking by Mr. Chief Justice Eakin, held that a municipality has no authority to grant a perpetual utility franchise. This being so, the ordinance conferred no right upon the plaintiff, and within the meaning of that principle he has no standing to assert any claim for relief against the city based on that enactment of its common council."

§ 237. **Perpetual franchise upheld as one for reasonable time.**—The case of *Levis v. Newton*, 75 Fed. 884, affd. in 79 Fed. 715, decided in 1896, held that although a franchise may be made in terms perpetual, the court will eliminate this provision wherever possible and uphold the franchise with this elimination because, having granted a franchise for the use of its streets upon authority to make such a grant, the rights thereby created will be preserved aside from the provision that they continue perpetually, which provision being beyond the power of the city to make is void; the court observing in part: "Assuming, but not deciding, that the city council had no authority to grant a 'permanent and perpetual' franchise, as in Ordinance No. 129 attempted, is the ordinance invalid because it contains a section wherein such grant is declared perpetual? No attempt is made in said ordinance to enter into perpetual contract with the city for lighting its streets, etc. It may be assumed that such contract would be invalid. The ordinance, as to time limit, only declares that Vaughn and assigns shall have 'permanent and perpetual' right to use the streets of the city so far as necessary and proper for construction and operation of its plant. No constitutional or statutory provision of this state bearing on the point under consideration is called to our notice."

This decision in its attempt to uphold franchise rights by eliminating the perpetual provision has not been generally followed and in effect obviously materially changes the grant originally made, which it will be remembered the courts refused to do in that series of cases, already referred to, where the franchise or contract period exceeded that expressly fixed and permitted by the statute, for in those cases the court held that the entire agreement was void because in excess of the power of the municipality and that the agreement could not be upheld for the

period permitted by the statute because that was not what the parties had agreed upon, because they had made another and a materially different agreement, for as the court said in the case of *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127, decided in 1898: "But the council had power, under section 2491, 1 Rev. St. (Bates' edition), to contract in a legal way for the lighting of its streets and other public grounds for a term not exceeding ten years, and, upon its being shown by the company that it had furnished light to the city, which it had accepted and enjoyed, a right to recover on a quantum meruit would arise in favor of the plaintiff. * * * Its rights would not be based upon contract, however, but would result from the conduct of the city in giving consent and direction. * * * And this is in accord with the general rule which is well expressed by Prof. Freeman in his note to *Robinson v. Mayor*, 34 Am. Dec. 625: 'As it [the municipal corporation] is permitted to exercise the powers which its charter authorizes, so it is prohibited from exercising those which are not authorized. Any act or attempted exercise of power which transcends the limits expressed or necessarily inferred from the language of the instrument by which its powers are conferred is beyond the authority of a municipal corporation, and is, therefore, null and void.'"¹²

To retain control in the interest of the public a franchise without limit as to time was upheld as one for a reasonable period in the case of *Mobile Electric Co. v. Mobile*, 201 Ala. 607, 79 So. 39, L. R. A. 1918F, 667: "The statute (section 1260 of the Code of 1907) authorized the contract in question, and provides no limitation upon the duration of same, though it is the policy of the law to declare contracts of this character unenforceable for an indefinite time and unreasonable period, upon the theory that, while there may be no statutory inhibition, the municipality can not, in the exercise of its delegated contractual right, perpetually or for an unreasonable time fasten upon the taxpayers and inhabitants rates and obligations that can not be changed or regulated during reasonable intervals so as to meet changed conditions and thereby avoid extortion and oppression. *McQuillin on Municipal Corporations*, pp. 3718, 3719; *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *Bessemer v. Bessemer Water Works*, 152 Ala. 391, 44 So. 663, *supra*. Such contracts are not specially prohibited or made

¹² See Follett, J., in *Cincinnati Gas Light & Co. v. Avondale*, 43 Ohio St. 257, 1 N. E. 527.

void in toto by any statute of this state, but are deemed invalid under the policy of our law to the extent to which they may transcend a reasonable and lawful period. Nor do they belong to that class which are void because contrary to public morals, etc. It is only the excess which offends against the policy of the law and which will be separated from the valid period and declared unenforceable."

§ 238. **Franchise limited to life of easement in street.**—A line of decisions from the Supreme Court of Massachusetts, including the case of *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566, 69 N. E. 346, decided in 1904, establishes this principle of refusing to find power in the municipality by implication to grant perpetual franchises, in a different connection which emphasizes the practical value and the necessity for the rule in the interest of the municipality. While admitting that the public only has an easement in the street or other highway and that the abutting owner has the title in fee in the property subject to this easement, the court held that the franchise whose period of duration is not fixed must be limited to the easement which the public has to use the street for transportation purposes and that when the street is closed to public traffic by vacation it is closed also to the incidental use of the municipal public utility. As this use for the means of communication or for the transportation of the conveniences of municipal public utilities is subordinate to the general public use for purposes of transportation, it is neither greater than nor inconsistent with the general use, and where the period is not fixed in the franchise the termination of the use of the street for the general purpose of transportation also terminates its use by the municipal public utility. If it did not, the city in closing the street would be liable in damages to the municipal public utility and the city would be held to have surrendered control over the street in this respect, which is contrary to public policy and to the many decisions holding that the power of control over its streets vested in a municipality does not give it the power to surrender its control over the streets.

It is true that in the case above referred to the franchise provided for the removal of the poles erected in connection with the installation of the public utility system on the order of the municipal authorities, but the decision in this case as well as that by the same court in the case of *New England Tel. & T. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835, decided in 1903, is to the effect that the vacation of the street under statutory authority terminated all rights of the public thereto as well

as the rights of the municipal public utility, which were secured and held because their use was similar and incidental to the general right of the public to travel over and along the street, for as the court expressed it: "Their rights in connection with the rights of others of the public are subject to reasonable regulation, or even to termination at any time, if the supreme authority, acting in the public interest, shall so determine. It follows that they have no rights of property in the street, and their constructions that were built therein were personal property, which they had a right to remove, and which could not be subjects for the assessment of damages under statutes of this kind."

§ 239. **Perpetual franchise under New York decisions.**—In opposition to this well established and generally recognized principle stands the decision in the case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684, decided in 1888, where a franchise granted by New York City to operate a surface street railway in Broadway which did not provide for the period of its duration, was held to have granted a perpetual right to use the street for this purpose. Several years after the construction of the street railway system and the giving of a mortgage under statutory authority covering the property and franchise the state attempted to repeal the charter and dissolve the corporation in connection with which a receiver was appointed to take charge of the property; and the action in the above case was brought on behalf of the people of the state against all the parties interested in the particular street railway company, including New York City. In the course of the opinion defining the various interests involved, the court decided that the franchise to maintain and operate the street railway system in Broadway survived the dissolution of the corporation whose charter term of existence was fixed at one thousand years. In holding that, although the corporation was chartered for this limited period it had the power to take full title to such property as was necessary for its use and operation and as the special franchise permitting its use of the street was not for a fixed period, the interest in the use of the street which was necessary for the maintenance and operation of its system was in perpetuity, the court said: "Among other claims made by the state, it is contended that the stated term of 1,000 years, prescribed in its charter for the duration of the company, constitutes a limitation upon the estate granted, and that therefore the corporation took a limited estate only in its franchise. * * * We think this question has been decided, by cases in this court, which

are binding upon us as authority, in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. Railroad Co.*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that, where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor. * * * The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in public streets for a public use in perpetuity, which should be irrevocable.¹³ * * * It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation or those who might lawfully succeed to its rights. When we consider the mode required by the statutes and the constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible; for it can not be supposed that either the legislature or the framers of the constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done. Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent. We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property, within the usual and common signification of that word." This decision rested on the authority of New York alone and expressly refused to follow the Supreme Court of the United States in the case of *St. Clair County Turnpike Co. v. People of Illinois*, 96 U. S. 63, 24 L. ed. 651, already discussed.

The case of *People v. Deehan*, 153 N. Y. 528, 47 N. E. 787, decided in 1897 that a franchise to install and operate a gas system is property which can not be destroyed or impaired by the arbitrary refusal of the municipality to consent to the laying

¹³ *Yates v. Van De Bogert*, 56 N. Y. 526.

of additional equipment in other streets that may have been laid out after the grant of the franchise, for as the court said: "When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect, according to its nature, purpose, and duration. There is no good reason for restricting its operation to existing highways, unless that purpose appears from the language employed."

This principle permitting the use of additional streets and the developing of other territory that may become a part of the municipality after the granting of the franchise is in accord with the general rule which recognizes the probability of the growth of the municipality and the consequent need of the development and extension of the municipal public utility service in connection with such growth. The Illinois decisions as heretofore shown are not inconsistent with this principle, but involve the converse of this proposition, for they hold that the franchise granted to any particular municipal public utility extends with the growth of the city, thus making one integral and harmonious system with the same rights and conditions provided in a common franchise. These authorities only show the necessity of holding that the territory annexed by the growth of the municipality becomes an integral part of it with the necessary result that the municipal corporation annexed is terminated as an independent municipality, consolidated and merged in the municipal corporation to which it is annexed, and that with the termination of its existence as an independent legal entity its franchise rights granted for an indeterminate period also terminate, and that in lieu of this there are substituted the franchise rights and conditions of the annexing municipality.

§ 240. **Duration of franchise limited by statute in New York.**—The case of *Blaschko v. Wurster*, 156 N. Y. 437, 51 N. E. 303, decided by the New York court of appeals ten years after its decision in the case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684, and the year following that, in the case of *People v. Deehan*, 153 N. Y. 528, 47 N. E. 787, indicates the change made by the legislature in this jurisdiction limiting the power of the municipality to the granting of fran-

chises for periods not to exceed twenty-five years. This action of the legislature goes to confirm the other decisions, and in effect to establish the rule generally that the municipality can not grant a perpetual franchise unless given the power to do so expressly and that such a franchise is contrary to public policy and against the general welfare. This decision of the highest court of New York in harmony with the general rule of strict construction holds that a charter granted in perpetuity in face of the limitation of twenty-five years placed on the power of New York City in its charter to make such a grant is void in its entirety. In the course of its decision the court said: "The new charter was approved on the 4th day of May, 1897, before the resolution granting the franchise in question was passed. Section 73 of this statute is as follows: 'Sec. 73. After the approval of this act no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years.' * * * And the granting of street franchises to railroads by the municipal assembly for more than twenty-five years is one of these forbidden acts. * * * What the railroad asked, and what the aldermen voted, was the right in perpetuity. * * * The city authorities had the power to make the grant for twenty-five years, but that was not the power that the railroad called into action, that the aldermen exercised, or the court restrained, but the unlimited power invoked and claimed independent of the new charter. We should construe the official act which the court restrained according to the spirit and intention with which it was performed, and in the sense in which it was viewed and understood by the court when the injunction was granted. So, we are inclined to hold that the consent, so far as it was given, was not a valid exercise of the power to grant consents for twenty-five years, and therefore the second question should be answered in the negative." This decision therefore in construing the provisions of the charter granted New York City in 1897 harmonizes that jurisdiction with the general rule.

§ 241. **Duration of franchise of state on acceptance perpetual.**—The case of *Suburban Electric Light &c. Co. v. East Orange Township*, 59 N. J. Eq. 563, 41 Atl. 865, decided in 1898, in denying the right of the township to rescind the privilege granted by it permitting the stringing of wires, in the exercise of which rights the public utility was installed and an extended investment made, held that the right having been acted upon, although only a license, could not be revoked at the pleasure of

the party granting it. After expressly recognizing that the right was ultimately granted by the state, the court held that it must be regarded as a grant in perpetuity, which, of course, was within the power of the state to make, for as the court said: "Moreover, the complainant's right to string the wires does not depend alone, if at all, upon the consent of the municipal authorities; it relates back to the legislative authority to string and maintain the wires upon certain conditions. No time is fixed by the legislative authority for the continuance of the exercise of the franchise, and the grant must be presumed to be perpetual, subject, it may be, as it probably is, to the right of the legislature to exercise upon it its police powers from time to time, as it in its wisdom may see fit."

The court in the case of *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123, decided in 1887, however, held that after an expenditure of a substantial sum by a municipal public utility in connection with the installation of its plant the special franchise privilege granted by the municipality could not then be revoked for the reason that the franchise could only be repealed by the legislature. In the course of its decision the court said: "I am of the opinion that, as a general rule, a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles made in reliance upon the municipal designation, the company obtains a vested right, of which they can not be stripped by a subsequent revocation of such designation. The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment. A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment, from the *Dartmouth College Case*, 4 Wheat. [U. S.] 518, to the present time. * * * No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to repeal or alteration by the legislature; and, when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the

power of a common council to strip them of any right so acquired."

§ 242. Whether unlimited municipal franchise is property and perpetual.—The case of *Seattle v. Columbia &c. R. Co.*, 6 Wash. 379, 33 Pac. 1048, decided in 1893, seems to hold that the franchise granted by a municipality being property is perpetual unless limited in the grant. The court, however, recognized the possible necessity of the municipality exercising control in spite of such franchise and suggested that it may do so by the exercise of the right of eminent domain. In the course of its decision the court said: "The property was the franchise—the right to use the street for the purpose of constructing and operating tracks thereon. * * * Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well-recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which at the same time affords protection to the rights of the respondents."¹⁴

That vested rights accrue on the installation of the plant according to the terms of the franchise and that such rights must be protected is decided in the case of *Commonwealth v. Portsmouth Gas Co.*, 132 Va. 480, 112 S. E. 792, where the court said: "We are of opinion that the charter of the gas company granted by the General Assembly in 1854 empowered the company to lay its pipes in the streets of the town of Portsmouth only after obtaining the consent of the town; that the resolutions of the town council in 1853 gave such consent, and have been so acted upon in subsequent years as to have conferred upon the gas company the consent of the municipality for an indefinite time, and to have constituted a contract which vested a property right

¹⁴ *Mobile v. Louisville &c. R. Co.*, 84 Ala. 115, 4 So. 126, 5 Am. St. 342; *States v. Noyes*, 47 Maine 189.

in the company; that the limitation on the corporate existence of the company to thirty years in its first and second charters did not operate to limit the period for which the consent of the city was given."

A grant by the city without limitation as to time was construed to be perpetual in its operation and effect in *Ashland Electric Power &c. Co. v. Ashland, Oregon*, 217 Fed. 158: "The grant is one to exercise the right generally, without any limitation as to the time of its running. There is no limitation set upon such a grant by general law, so far as I have been advised; nor is there to be found in the corporate powers of the city existing at the time of the grant any such restriction. So it would seem, in view of these authorities, that the grant was one in perpetuity. It is insisted that to enable a municipality in Oregon to confer such a privilege its authority must be deduced from the constitution or statutes of the state, and specially conferred, and that the state Supreme Court has so held. The essential difference between that doctrine and the doctrine of the federal Supreme Court is that by the former it is deemed that explicit legislative authority is essential to the conferring of a perpetual license, while by the latter a general authorization to grant a right or privilege of the kind is considered to carry with it the power to confer a perpetual license, such license partaking of the nature of a contract with the city, and a grant by the city without limitation as to time must be deemed perpetual in its operation."

To the same effect the United States Supreme Court construed an indefinite grant as one in perpetuity in the case of *Covington, Kentucky v. South Covington & Cincinnati St. R. Co.*, 246 U. S. 413, 62 L. ed. 802, 38 Sup. Ct. 376, as follows: "As there is no hint at any limitation of time in the grant to Abbot, and, on the other hand, the city grants all the right and authority that it has the capacity to grant, there can be no question that the words, taken by themselves, purport a grant in perpetuity more strongly than those held to have that effect in *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389. * * * The only part of this branch of the case needing further discussion concerns the rights acquired by the plaintiff through the purchase of its rival's, the Covington Street Railway's, lines. This company, under the ordinance of 1864 that we have mentioned got a franchise limited to twenty-five years, but with provisions that there should be a new bid after that time and that the successful bidder, if other than the

Covington Street Railway Company, should purchase its property upon a valuation. It did not lose the value of that property by the ending of its right of use. * * * This grant was on condition that the plaintiff should remove the tracks by which it connected with the suspension bridge under the ordinance of January 28, 1875, and give up its rights to the same, which as we have said were rights in fee. It got other access to the bridge over the Covington Street Railway line, but we agree with the district judge that it is not to be supposed that it would give up its perpetual right for a franchise having eight years to run over a less convenient route, so far as this part of its purchase was concerned. We agree also that the language of the ordinance conveys more than a license to purchase what the vendor had. The title and the operative words import a grant and the reference to the ordinances regulating the plaintiff's right in the streets adopts as the measure these, not the contract with the selling road. The ordinance was followed by the contemplated contract in July, 1882. Some further grants need no special mention. We are of opinion that the plaintiff's right in this part of its system also is a right in fee. The question of the power of the city to grant a perpetual franchise needs but few words. By statute the streets were 'vested in the city,' and the authorities of the city were given 'exclusive control over the same,' and in another section the council was given 'exclusive power to establish and regulate all sidewalks, streets, alleys, lanes, spaces and commons of the city.' Acts 1849-1850 chap. 237, art. 1, secs. 2, 16, p. 239, art. 2, sec. 19, p. 247. No decision of the state court is brought to our attention that calls for any hesitation in following the authority of *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389, and pronouncing the authority complete."

Where the franchise is expressly made continuous and perpetual, it will not be treated as exclusive by implication. A municipality granting a franchise right in perpetuity under proper authority does not thereby divest itself of its power of regulation under the police power which could not be surrendered. While recognizing that property rights are secured by virtue of such a franchise, which are assignable and subject to sale, the Supreme Court of Missouri also recognizes the change in the method of control since the creation of its public service commission. Under the old method of control by franchise provisions and conditions imposed by it, short term franchises were generally regarded as necessary, but under the present policy of regu-

lation by public service commissions which is continuous, the duration of the franchise and the necessity for its renewals have been radically changed. The former plan of retaining control in order to secure adequate service at reasonable rates by the necessity of frequent renewals of the franchise was arbitrary, unsatisfactory, and expensive to all parties concerned. Because of the uncertainty of the terms of renewal and the possibility of a refusal to renew at all, the company was naturally handicapped in financing its investments and in deciding on making extensions and improvements in its service, and frequently hesitated in making enlargements and additions to its plant. With the present plan of commission control, especially where the policy of granting indeterminate permits prevails, there is no longer the necessity of hesitation in making improvements and extensions or additions to the plant, and these can be much more easily financed with the knowledge that the right to the continued operation of the plant is established. This principle and the reasons upon which it is based are well expressed as follows in the case of *State v. West Missouri Power Co.*, 313 Mo. 283, 281 S. W. 709, where the court said: "The right or franchise to enter and occupy the streets and alleys of the city for the purpose of operating and maintaining electric lights and electric motors, so given by section 1, was by section 2 expressly made 'continuous and perpetual.' * * * As it is not otherwise drawn into this controversy, no further notice will be given it, except to say that it gives emphasis to the fact that the rights and privileges granted in perpetuity were not intended to be exclusive. Section 15, art. 2, of the Constitution, declares that the legislature can not pass a law 'making any irrevocable grant of special privileges or immunities,' while section 53, art. 4, prohibits it from passing any local or special law 'granting to any corporation, association or individual any special or exclusive right, privilege or immunity.' All municipal ordinances, which are enacted under powers delegated by the legislature, are necessarily local laws. It follows that no special privilege or immunity, whether revocable or irrevocable, can be granted by the municipal ordinance. * * * The franchise granted by the city of Warrensburg, though perpetual, being nonexclusive was not a 'special privilege or immunity' within the purview of the constitution. * * * For many years a consideration of the expirations of short term franchises, with the possibility in every case of a refusal to renew, was practically the only constraint upon public service corporations to cause them to give adequate

service at reasonable rates. But recently effective control and supervision of both service and rates have been given public service commissions, and this, with the further fact that immense amounts of capital are necessary to equip and operate the present day plants of such utilities as telephone and light and power companies, which must for the most part be procured from the investing public at large, has caused a departure to some extent from the judicial policy above referred to. * * *

At the time the franchise involved in this controversy was granted, no limitation with respect to the duration of such franchise was imposed by the general law of the state or by the charters of cities of the third class. It must therefore be held, in view of the decisions just referred to, that the ordinance of the city of Warrensburg in expressly granting a right in perpetuity was valid and effectual for that purpose. Decisions holding that public service corporations can not, without the consent of the state, divest themselves of the franchises and property by which alone they can discharge the public duties for which they are chartered are not applicable in this case. When Freeman accepted the grant under the ordinance and constructed conformably to its terms an electric lighting plant, and put it into operation, he acquired a property right which was assignable, taxable, and alienable. * * *

The franchise held by appellant, though in perpetuity, is subject to forfeiture for misuser, nonuser, or abandonment. In addition to that, its exercise is under the dominance of the police power delegated the city, which the city did not surrender and could not have surrendered had it attempted to do so. There can be no doubt, therefore, but that it has ample power to compel appellant, in bringing the high tension wire into the city, to do so in such manner and under such safeguards as will effectually protect the citizens from the apprehended dangers."

While recognizing the rule of strict construction of franchises in favor of the public, the court of Michigan also recognizes the obligation of the public to the grantee, and after large investments have been made in the plant, and where there are no express limitations in the franchise and the charter of the public utility holding the franchise has been renewed and the term of its existence extended, this court holds that the municipality granting the franchise may not enjoin the public utility holding it from taking advantage of its provisions and enjoying the property rights created by it. In holding that so long as the charter is in effect the franchise rights continue available to the com-

pany, although indicating that these rights would probably terminate with the life of the charter, the court said in the case of *Benton Harbor v. Michigan Fuel & Light Co.*, 250 Mich. 614, 231 N. W. 52: "The rights here involved are within the protection of the federal Constitution; and the decisions of the federal courts rather than those of other state courts must be deemed controlling. As above noted, the corporate term of the Excelsior Gas Company, to which this gas franchise was granted, was not fixed or limited because it possessed the power of renewing and extending the term of corporate existence. No term limit of the Benton Harbor Gas franchise will be found either in the franchise itself, in the corporate charter of the grantee, or in the constitution or statutes of this state at that time. The parties agreed upon the terms of their franchise contract, and courts can neither add to nor take from. In passing, it may be noted that there is now in this state a constitutional limitation fixing thirty years as the maximum term of a franchise granted by a municipality; and there is a like constitutional limitation of the term of a corporate franchise but with a statutory right of renewal. Const. art. 8, section 29, art. 12, section 3; and section 9048, Comp. Laws 1915. We are mindful of the rule of construction applicable to grants of this character. They should be construed most strongly against the grantee and in favor of the public. *City of Detroit v. Detroit United Railway*, 172 Mich. 136, 137 N. W. 645; *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. ed. 651. But a franchise accepted by carrying out the contemplated undertaking incident to which large sums of money are expended must be held to be contractual in nature and to result in vested rights which the law protects.

* * * It has been held by high authority that, when a corporation renews or extends its charter term under provisions similar to those in our statute, it thereby extends the life of a municipal franchise granted without term limit to such corporation. *City of Owensboro v. Telephone Co.*, 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. 988, *supra*; *City of Owensboro v. Owensboro Waterworks Co.*, 243 U. S. 166, 37 Sup. Ct. 322, 61 L. ed. 650. Without determining whether the legislature has the power to limit or repeal the statute which now provides for renewals or extensions of the corporate term (see article 15, section 1, Const. 1850; also *City of Owensboro v. Owensboro Water Co.*, *supra*), at the expiration of which a municipal franchise of this type would become extinct, we do hold that this Benton Harbor gas franchise is still operative. * * *

We hold that the defendant com-

pany is operating under a valid existing franchise; and we find nothing in the record which would justify granting the injunctive relief sought. * * * Since, as above noted, defendant has the right to continue its mains in the streets of Benton Harbor, and since continuing its use of such mains as a means of supplying gas to St. Joseph does not appear from this record to work any injury to plaintiff or to be any additional burden upon its streets, we think an injustice rather than an equity would be done, if plaintiff were granted the relief sought. Under such conditions it should be denied."

Franchise rights to build and maintain toll bridges which are in terms perpetual are property rights which are assignable and may extend beyond the life of the first taker. The duration of such rights is unlimited in the absence of any statutory or constitutional limitation, for as the court said in the case of *Hamill v. Hawks*, 58 Fed. (2d) 41: "The grants from each county to construct and maintain the bridge and collect tolls were in terms to be perpetual, and there was no law or constitutional provision in effect when they were made, or now, that prohibited or limited such grants as to duration, nor were there prohibitions against making such grants to individuals and their assigns. * * * They are property rights of value and are entitled to protection against invasion or destruction as long as they exist according to their terms, when the granting power that gives them acts within authority conferred upon it. The Supreme Court of Oklahoma has not held that such franchises can be granted only to an Oklahoma corporation, nor that they can not be made perpetual, nor that they are not assignable, nor that they do not continue beyond the life of the corporation to which they are first issued, if they have been issued for a longer term than the life of the corporation. It has been held (*Postal Bridge Company case*, 139 Okla. 225, 282 Pac. 462, *supra*) that they may be assigned to, exercised and enjoyed by individuals; and we believe the general rule of law, both state and national, to be that in the absence of such prohibitions they continue to exist as valid contracts in favor of assignees. * * * These franchises being perpetual and assignable extended beyond the life or lives of the first takers, whether corporate or individual, according to the settled rules. And the legislature in conferring power on counties to issue them and the counties in executing that power acted in discharge of proprietary or business powers, as distinguished from their governmental powers, so that the

relation between them and the party to whom the franchises were issued was contractual."

Where a franchise contained the power of assignment and was unlimited in its terms as to the period of its duration, there being no constitutional or statutory limitation, the court sustained the franchise grant as being without time limit. This principle is in accord with the earlier federal cases and is the effect of the decision in the case of *Denver, Colorado v. Denver Tramway Corp.*, 23 Fed. (2d) 287: "Furthermore, the validity of the Ordinances of 1885 and 1888 has been sustained by this court, and is no longer open to question here. * * * It was further held on the former appeal that none of the ordinances above mentioned constituted contracts between the company and the city relating to fares, first, because they were not contractual in form; second, because the city never possessed the power to make a contract suspending its power to regulate the fares charged by the company. These rulings also have become the law of the case, and are not open to review here. Such is the established practice in this circuit. * * * The court held that the ordinance there involved constituted a grant in perpetuity. The trial court in the case at bar based its finding as to the duration of the grants in the Ordinances of 1885 and 1888 upon the decision in the *Old Colony Trust Co.* case, and other similar cases. While the finding as to the duration of the grants contained in the Ordinances of 1885 and 1888 was perhaps not strictly necessary to a determination of the case at bar, yet we think the trial court was justified in making a finding on the subject. * * * These grants by their terms were unlimited as to duration, and contained the power of assignment. Under such circumstances, the grants were without time limit, in the absence of constitutional or statutory limitations. * * * The state courts held the franchise under the ordinance was revocable ten years after the date of the grant. In reversing the judgment of the state court the Supreme Court said: 'In *Northern Ohio Traction (& Light) Co. v. (State of) Ohio* (ex rel. Pontins) 245 U. S. 574, 38 Sup. Ct. 196, 62 L. ed. 481, L. R. A. 1918E, 865, we pointed out the state of the law in Ohio during 1892. It is plain enough from what was there said that in our view the franchise originally granted by the village of Orrville was for an unlimited time and not subject to termination at the mere will of the grantor.' * * * The holdings in the foregoing cases that the ordinance easements or franchises were unlimited in time, do not imply that the grants were ex-

empt from the constitutional exercise of the police power, or that they could not be revoked for nonuse or misuse. * * * Turning to the case at bar with these principles in mind, we find that the wording of the Ordinances of 1885 and 1888 is similar to that of the ordinances considered in the cases cited; i. e., no time limit is affixed to the grants. But it is contended by the city that constitutional provisions of the state of Colorado forbade the granting of easements without time limits. * * * It is thus seen that in no one of the cases cited by the city in which article 2, section 11, of the Constitution of the state of Colorado is referred to, is it held that a city may not make a grant to a public utility of an easement in the streets without time limit. Furthermore, even if those cases did so construe that constitutional provision, yet, inasmuch as they were all decided after the rights in the case at bar had accrued under the Ordinances of 1885 and 1888, such decisions would not be binding upon the federal courts, but those courts could exercise their own independent judgment on the question involved. * * * We agree with the conclusion of the trial court that neither in the Constitution of Colorado, nor in its statutes, nor in the charter of the city of Denver, are to be found any provisions prohibiting grants without time limit, such as were contained in the Ordinances of 1885 and 1888. We also agree with the conclusion that the grants of rights of way and easements contained in the Ordinances of 1885 and 1888 must be construed to be without time limit, in accordance with the ruling in *Old Colony Trust v. City of Omaha*, and other kindred cases, *supra*."

§ 243. **Indeterminate permits.**—Before the advent of public utility commissions, franchises in most states were granted for a fixed, definite period as the best means then available of controlling public utilities and regulating their rates and service. The acceptance of such a franchise by the public utility constituted a contract and carried the privilege of occupying the streets and other public places for the purpose of rendering its service, and included such matters as rates and other conditions of rendering the service which were generally provided by the terms of the franchise. During the franchise period these conditions could not be modified, eliminated, or supplemented to meet new conditions or changed relations as they might arise due to new inventions and improved methods of business in the fields of industry and finance. Under this plan of granting franchises for a limited time or a definite period the franchise rights terminated the contractual relation covered by them on the expiration of the

franchise term, and neither party could be required to renew or to continue to furnish or accept service after such termination. The right of the public utility furnishing the service to remove its equipment was clear and undoubted, although the exercise of this right might result in an extravagant waste of property on account of its removal and the consequent expense of repairing and repaving the streets. Upon such a condition arising, substantial investments in plant and extensive going-concern values were reduced to whatever the tangible property would bring after being dismantled and removed from service. At the same time the service was discontinued and consumers suffered from the loss of service. All such inconvenience and loss of service and investment were finally borne by the consumer, because this was necessarily charged to the cost of service by the utility rendering it. So that the interest of the public as well as that of the utility required that this be avoided by the continued use of the plant, which could be most surely and easily secured by means of the continuous franchise, which has sometimes been aptly described as the "indeterminate permit."

The advantage of conserving these investments by some form of uninterrupted franchise as was not done under the old form of granting these rights for fixed periods was illustrated in the case of *Denver, Colorado v. New York Trust Co.*, 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. 657, which decided that on the expiration of such fixed period mentioned in the franchise, all rights to the use of the streets were terminated, and that although the municipality might have renewed the franchise or purchased the plant it was not obliged to do either, for as the court said: "In the absence of some stipulation to that end, the city would be under no obligation to purchase or renew, nor would it be entitled to do either."

The case of *Detroit v. Detroit United R. Co.*, 172 Mich. 136, 137 N. W. 645, likewise held that the contractual relations existing between the municipality and the street railway company, operating under a franchise, terminated with the expiration of the franchise period, and all rights of the company in the use of the streets and in maintaining and operating its street railway system ceased, so that the city had the unquestioned right at any time thereafter to compel the company to vacate the streets by removing all of its property. This decision was sustained by the Supreme Court of the United States in the case of the *Detroit United Ry. v. Detroit*, Michigan, 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. 697.

While a corporation commission may issue "revocable permits," its action in doing so will be set aside unless it was done in accordance with the provisions of the statute, as was indicated in the case of *In re Consolidated Gas Utilities Co. (Okla.)*, 11 Pac. (2d) 473, where the court said: "This is an appeal by the city of Tonkawa, Oklahoma, from an order of the corporation commission of the state of Oklahoma, granting to the Consolidated Gas Utilities Company a revocable permit under the provisions of House Bill No. 4, chapter 102, Session Laws 1925, known as the Revocable Permit Act. The issues presented herein are settled in favor of the plaintiff in error by the application of the decisions in *City of Okmulgee v. Okmulgee Gas Co.*, 140 Okla. 88, 282 Pac. 640, and the companion cases, *City of Okmulgee v. Okmulgee Gas Co.*, 141 Okla. 98, 284 Pac. 70; *City of Hugo v. Oklahoma Power Co.*, 141 Okla. 100, 284 Pac. 12, and *City of Cushing v. Consolidated Gas Utilities Co.*, 141 Okla. 82, 284 Pac. 38. The judgment of the corporation commission is reversed, and the cause is remanded, with directions to dismiss the proceedings."

This principle, providing for the continuous franchise or indeterminate permit, is a logical feature of our modern system of commission control of public utilities. The franchise or permit providing for the public service constitutes the basis of the relation and determines the rights and duties of the interested parties. The nature of the service, and the conditions under which it is furnished, including the period of duration for such service, are all fixed and determined by the franchise, which constitutes the foundation for the regulation of the service by the commission. The principle thus established by the use of the indeterminate permit provides uniformity in practice and subjects all utilities to the same method of control on a uniform plan of regulation. In its thirty-fourth annual convention the National Association of Railway and Utilities Commissioners resolved that the principle of the indeterminate permit is economically sound, and recommended its adoption in each state. Under the provisions of the continuous franchise or indeterminate permit, the utility acquires the right to operate continuously under the regulation and control of the commission, so long as the service is sufficient and satisfactory, and subject at all times to such rate regulations and adjustments as are necessary to meet changing conditions. The plan obviates needless controversies, which arose under the fixed arbitrary form of franchise and which tended to prove expensive and to impair the service, the

credit of the utility and the value of its investment, and ultimately resulted in higher rates and less satisfactory service, occasioned by adjustments which were necessary at the expiration of fixed-term franchises. The indeterminate permit provides a plan for continuous, sustained service based on permanent investments and a scale of operating costs in the interest of economy and efficiency. The plan, therefore, tends to serve and protect the interests of all parties concerned. The consumer secures adequate and satisfactory service at fair and uniform rates; the utility can obtain the most favorable terms of financing, and is justified in making extensions and improvements promptly and permanently, and in keeping the plant in a high state of efficiency at all times, as the investment can only be terminated by misuser or nonuser or by resort to the policy of municipal ownership by its purchase at the fair value of the property, actually used and useful for the service of the public. The expense and political activity which formerly too often attended the securing or renewing of franchises are entirely eliminated by the permanency of the indeterminate permit.

Regulated and uninterrupted service during good behavior, when given exclusively by a single utility, is generally preferred to the regulation which competition can not give, and to franchise regulations for fixed periods of duration under the former practice, which obtained before the establishment of our present plan of commission control. The service which is now afforded under this more modern plan of control is, of course, always subject to the reserved right of the commission to grant similar permits to others where convenience and necessity may require and justify it, and subject also to the right of the municipality to purchase the plant. In this way, investments and service are not periodically disturbed by the interruptions of service and the fluctuations in the values of securities, consequent on the expiration of franchises; and the financial policy of amortizing the investment over the franchise period, which was formerly attempted, may now be obviated. With the right to serve continuing indefinitely and being exclusive, at least so long as the service is satisfactory and sufficient, investments in plant and equipment are made permanently and much more substantially and on better terms and are maintained at a higher level of efficiency because they are recognized as being permanent and secure. This has the effect of stabilizing investments for the investor as well as for the utility, which in turn effects economies for the benefit of all interested parties, including the consumer.

The exchange of a franchise for an indeterminate permit does not have the effect of destroying vested property rights, nor of releasing the company from the obligations assumed under the franchise of conveying its plant to the municipality under certain conditions. This principle is well expressed as follows in the case of *Todd v. Citizens Gas Co.*, 46 Fed. (2d) 855: "We find nothing in the language of the statute or in the decisions of Wisconsin prior to its enactment which would indicate an intention on the part of the legislature that a public utility, by surrendering its franchise, might thereby destroy vested property rights which it had voluntarily created, and release itself from obligations respecting those rights which it had voluntarily undertaken before the existence of the franchise and as an inducement to the municipality to make the grant of the privilege. * * * The question here is, What has the legislature done? It has authorized the giving up of one privilege from the state and the acceptance of another in lieu thereof. It has not required the utility, as a condition of the exchange, to give up any of its property rights; and it is equally clear that it has not authorized the utility, by the surrender, to expand its property rights, at the expense of the public. The obligations from which the utility frees itself upon the assumption of the new obligations are those 'relating to the privilege feature.'"

A municipality which was rendering service to the inhabitants of another town by requiring them to take the service from the limits of the municipality was not operating as a public utility within the limits of the town and therefore did not have the exclusive right to furnish service there by virtue of an indeterminate permit, because the service was delivered at its own borders and not within the town itself so that it could not have had or required an indeterminate permit, as was indicated in the case of *Wisconsin Gas & Elec. Co. v. Railroad Commission*, 198 Wis. 113, 222 N. W. 783: "The claim of the defendant city that it has a prior right under an indeterminate permit to render exclusive service to the people of the town of Plymouth as a public utility hangs entirely upon the fact that at the time it purchased the utility in question the utility was serving and thereafter continued to serve Mr. Eastman by a drop cord, which extended beyond the limits of the city into the town of Plymouth. The defendant city can base no claim to an indeterminate permit on account of services to other customers in the town of Plymouth prior to 1917 because it required them to come to the city limits to receive its service. It did exactly what it was necessary for

it to do in order to prevent itself from becoming a public utility operating in the town of Plymouth. The evidence fails to disclose by whom or under what circumstances the extension to the home of Mr. Eastman was made. It was at best an equivocal act. The city placed its own construction upon it. The city, by requiring other residents of the town of Plymouth to build lines to the city limits in order to receive service, quite definitely took the stand that it was not obligated to render electric service in the town of Plymouth. If the circumstances were reversed and a city furnishing utility service had inadvertently stepped over the city boundaries to render a very slight service at practically no expense and we were asked to hold that it was thereby obligated to serve the entire town, although the city had no intention of entering the town as a public utility, it would require a most strained and unnatural interpretation of the facts and the law to so hold. We do no more in this case than to determine, as the trial court determined, that the city has no such exclusive right to render utility service within the town of Plymouth."

§ 244. **Elastic regulation.**—Regulation under this plan is the most elastic, for it is currently available at all times, because the permit may be revoked for cause or terminated by municipal ownership if this becomes necessary or desirable, in contrast to fixed, arbitrary franchises which forestall control during their terms and tend to unsettle the relations of all parties at their termination. This plan provides an uninterrupted service and conserves the necessary investments under continued regulation and control, and thus avoids arbitrarily discontinuing service and investments to the inconvenience and loss of all parties, which frequently occurred under the old plan of granting franchises for fixed periods. Under this later form of franchise, the indeterminate permit, the public utility commission determines in the first instance whether public convenience and necessity demand utility service when such a company purposes to install its plant and furnish its service, and only after determining this question in the affirmative and granting the permit by the commission, may the plant be installed and the service furnished. The plan avoids needless competition by legalizing a monopoly of service. The conditions and regulations for granting such permits and such exclusive service privileges are that the utilities securing them shall be constantly and completely under the regulation and control of the state through its public utility commission, and that the utilities shall furnish adequate and satisfactory service at reasonable rates. Public utilities, operating under in-

determinate permits, are in a better position to render continuous service at uniform and economical rates and to sustain their investments and maintain their credit to advantage, because their service is continuous and exclusive. Under this plan the utilities are protected against competition and the loss of their plant investments which results on the expiration or forfeiture of their franchises, when these are granted for a fixed period, unless they secure a renewal of their franchises or the sale of their plants as going concerns.

Experience demonstrates that under this plan, so long as proper service is given at reasonable rates, competition is seldom, if ever, encountered and municipal ownership, which should always be legally available, is generally unnecessary. The plan has proved popular when established, and wherever adopted seems to be equally satisfactory to all concerned. It is sound legally and economically, and its advantages have been demonstrated and employed beyond any other established system for the regulation and control of public utilities. While its acceptance has, of necessity, been voluntary, it has been received with favor in most cases, and practical experience has demonstrated its advantages and justified its permanent establishment as being probably the best and most advanced form for commission control. It has become an integral and essential feature of many of the later and more advanced systems for the regulation and control of public utilities; and it appears to be one of the most fundamental and valuable features now available for this purpose, and constitutes at once the most unique and comprehensive method known for realizing to the fullest extent the advantages of a continuous commission control of public utilities. The courts have recognized this principle as being legally sound and economically advantageous ever since it has become established in practice. The practical effect of this plan is very well indicated in the leading case of *State v. Kenosha Electric R. Co.*, 145 Wis. 337, 129 N. W. 600, decided in 1911, in which the court defined the purpose and effect of indeterminate permits as follows: "The public utility law in form in unmistakable terms disabled the city of Kenosha from making such a grant as that in question after respondent's indeterminate permit took effect. * * * The intent was to give the holder of an indeterminate permit, within the scope thereof, a monopoly so long as the convenience and necessities of the public should be reasonably satisfied, yet to secure to the public the benefit of the monopoly in excess of a fair return upon the investment, under

proper administration, by insuring to the consumers the best practicable service at the lowest practicable cost and to that end prohibit, conditionally, the granting of just such franchises as the one challenged in this case."

One of the best arguments for public utility commissions and these indeterminate permits, as an integral feature of this form of control, was found in the case of *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131, where the court said: "The findings are to the effect that only the privilege feature of the old franchise survived the surrender for its equivalent emanating directly from the state; that all the conditions and limitations of the old and all contract features between the city and the owners of the privilege inherent in the grant were extinguished by the surrender and superseded by the 'conditions and limitations' of the public utility law. * * * In other words, the idea is that the grantee, under state control, and subject to prescribed limitations and supervision, shall have a 'monopoly,' as it has been several times called by the railroad commission, in its administrative work and by this court, within the field covered by the privilege, as to rendering the particular public utility service, whether directly or indirectly, to or for the public. We should say, in passing, that the term 'monopoly' as thus used is to be taken in the sense of a mere exclusive privilege granted for a consideration equivalent; monopoly only in the sense that the field of activity is reserved to the grantee, the mere element of exclusiveness. * * * The evident intention of the legislature, expressed in unambiguous language, when read in the light of the situation dealt with, was * * * to substitute a new situation, all looking to unity in practical effect of a multitude of diverse units corresponding to the many outstanding franchises, and others in prospect, harmonizing them by making them referable to a single standard, to wit, the public utility law, and to a single control, to wit, control by the trained, impartial state commission, so as to effect the one supreme purpose, i. e., the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit—a condition as near the ideal probably as could be attained."

Such is the chief purpose and effect of indeterminate permits as defined and sustained by the courts in practical application. Among the earliest of the judicial decisions are those of the Supreme Court of Wisconsin where this plan of control has been in use since 1907 when it was established by statutory enactment.

During all that time, however, the commission has found no necessity for authorizing the operation of competing utilities in any city, although competition was made available under the plan at all times for the protection of the public interest and for supplying the public needs at any time the existing utilities fail in serving the public adequately and at reasonable rates. In the granting of exclusive privileges to serve any given community so long as the service is satisfactory and sufficient, this plan guaranties to the public the best service at the lowest cost, as fixed and determined by an impartial commission of trained experts of the state whose findings are based upon wide experience and uniform rules of practice of regulation under the same or similar forms of franchise permits. The continuing franchise under this form of control secures for investors the right to a fair return under this form of permit and a fair price for the plants on their purchase by the municipality on such terms and conditions as the commission may determine to be just and right. And in relieving utilities of the risk of competition and the possible loss of their investments on the expiration or forfeiture of their franchises, their investments are conserved and can be financed to better purpose, which operates to the advantage of all parties. By requiring uniformity in rates and discontinuing discriminations in the form of free service, which commonly prevailed under the old franchises, utilities can serve the public better and at lower rates and also finance their operations to better advantage. The plan provides continued regulation and control of rates and service and avoids the necessity of bargaining for franchises and the constant uncertainty of interruptions of service and policies, which commonly prevail under fixed-term franchises. It also places constant control in the hands of an experienced, disinterested commission of trained experts representing the entire state. This gives uniformity in the regulation of rates as well as in standards of service and should tend to promote a spirit of cooperation between the utilities and the public, because of such uniformity of rates and service as a continuous policy.

Public interests are not conserved, nor can those of the utilities be, by the policy of the fixed-term franchise, which serves as a constant reminder that on the expiration of the franchises for any or no sufficient reason, the utilities may be denied the right to serve advantageously or at all and thus be required to dispose of their plants and equipment as junk or at any price which may be obtained by a trespasser or by one having no further right

to use it as originally designed. Such risks are wholly unjustifiable and may be avoided by the policy of a continuous franchise in the interest of all parties, for in this way capital can be secured advantageously, because of the permanency and security of its investment. Service to the public is assured, and this can be made adequate and continuous under the plan at the lowest possible cost to the consumer. Such can not be the case where competition exists or threatens and where entire plant investments are subject to the risk of a discontinued service on the expiration of a fixed-period franchise. Under the indeterminate permit the owners or investors in public utility plants are assured of a reasonable return on their investments and the continuance of their business on such terms, so long as the service proves adequate, without the risk and interference of competition, and subject only to the right of the municipality to purchase the plant at its just value insofar as it is used and useful for the convenience of the public and on such terms and conditions as may be determined by the commission. Those jurisdictions, which employ indeterminate permits for the practical effect of this continuous franchise form of regulation, are generally agreed as to its desirability from the standpoint of the utilities and the investors in their securities as well as the patrons and the public at large, and it bids fair to become general in practice, when its advantages are demonstrated and its merits realized.

The acceptance of indeterminate permits in lieu of existing franchise rights for fixed periods, however, can not be forced but must be voluntary. The Supreme Court of the United States in the case of *Superior Water, Light & Power Co. v. Superior*, Wisconsin, 263 U. S. 125, 68 L. ed. 204, 44 Sup. Ct. 82, expressed this rule of law as follows: "The integrity of contracts—matter of high public concern—is guarantied against action like that here disclosed by section 10, art. 1, of the federal Constitution: 'No state shall * * * pass any * * * law impairing the obligation of contracts.' It was beyond the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract." As the court here indicates franchise rights are contracts and can not be set aside without the consent of the parties to them. However, by agreement of the parties, indeterminate permits may be substituted for existing franchises, and this is the common practice in such cases where there are valid outstanding franchise rights. Where, however, such rights are granted or created after the provision for indeterminate permits, this form of franchise is the one now

granted by those jurisdictions providing for it. Nor can the states, after the granting of indeterminate permits or their acceptance in exchange for fixed franchises, subject the holders thereof to additional burdens or obligations inconsistent therewith.

The utilities can not be required to render free service or to discriminate in their rates because this would be in violation of the contract, after the granting of such a permit, although the old franchises may have so provided. As the court in *Greensburg Water Co. v. Lewis*, 189 Ind. 439, 128 N. E. 103, P. U. R. 1922E, 545, expressed the rule: "Appellant accepted the proposal of the state by surrendering its franchise in accordance with the provisions of the act. By this acceptance the minds of the parties met and agreed on the terms of the proposal embodied in the act, and a contract was thereby concluded between the state and the appellant whereby all the terms, conditions and provisions of the existing franchise agreement were abrogated and rescinded. The state was a party to the franchise agreement which the city of Greensburg made with appellant, acting for the state under delegated authority. Later the state, acting directly through its legislature in making the proposal and through its public service commission, on which it had conferred express authority in the premises, entered into a contract with appellant by the terms of which such franchise agreement was abrogated and rescinded in toto as to both parties. By the * * * act quoted (Acts 1919, P. 709) the state attempted to violate the obligations of a contract made with appellant by the force of which the franchise contract had been abrogated in all its terms as to both parties. The act attempts to revivify and reestablish some of the terms of the abrogated contract which were burdensome on appellant and to enforce such terms against appellant without its consent. That part of the act, if enforced, would clearly impair the obligations of contracts, and for the reason stated it must be held to be void as in conflict with the sections of the constitution heretofore quoted."

In defining the same principle and denying the validity of an ordinance which required the utility to pave between and alongside its tracks, the public service commission of Indiana in the case of *Indianapolis St. R. Co. v. Indianapolis (Ind.)*, P. U. R. 1922E, 545 said: "To determine this question [of the liability to pave between tracks], we must ascertain the effect of the surrender by the petitioner of its franchise with the city of Indianapolis and the acceptance of the indeterminate permit as

provided by law in lieu of the franchise so surrendered. * * * The state having thus induced the petitioner to surrender its franchises and having entered into a new contract whereby the petitioner was relieved from its paving obligations, under the requirement of the franchises surrendered, it would seem unjust, unreasonable and inconsistent to permit the city as the agent of the state, without consideration or petitioner's consent, to reimpose the burdens from which petitioner had been relieved."

The advantages of indeterminate permits are fully recognized and defined as follows in the case of *In re Los Angeles R. Corp.*, P. U. R. 1922A, 66, where the public service commission said: "The best solution, from the point of view of both the city and the company, would seem to be the acceptance by both parties of a form of so-called indeterminate resettlement franchise. Such a franchise can be drawn to protect properly all parties and interests. * * * In the absence of an adequate franchise, the further street car development must lag and service must suffer."

The same commission in the *Fresno Traction* case, P. U. R. 1922E, 341, expressed itself as follows: "This commission has on several occasions expressed its opinion of the desirability, from the standpoint of the public, of exchanging obsolete and undesirable term franchises for more desirable and more modern indeterminate franchises. * * * From the standpoint of the company's bondholders, the franchise exchange is a desirable step and one tending to enhance the value of the security."

In *Fort Smith Light & Traction Co.*, P. U. R. 1920C, 418, the commission of Arkansas in sustaining this policy said: "The chancellor also held that the obligations of the contract are not impaired by the surrender of the franchise as provided in section 15 of said act."

The Supreme Court of this same state in the case of *Arkansas Natural Gas Co. v. Norton Co.*, 165 Ark. 172, 263 S. W. 775, P. U. R. 1924E, 675, said: "Section 15 of this act provides, in effect, that contracts, franchises and leases may be restored to utilities operating under indeterminate permits upon application made by such public utility corporation in the manner provided in the act."

Where the franchise has been exchanged for an indeterminate permit by action of the state under proper authority, the courts of Indiana hold that the exchange has the effect of wiping out all the terms of the franchise, which had been granted by the municipality and that interurban freight cars might pass through

the streets of a municipality with its consent without being an additional servitude. This principle is established as follows in the case of *Chicago, Lake Shore & South Bend R. Co. v. Guilfoyle*, 198 Ind. 9, 152 N. E. 167, where the court said: "And as the rights which the public utility now has were none of them conferred by the franchise contract with the city, but only by the provisions of the statute * * * and orders of the public service commission issued under authority of that and other statutes, the surrender of the franchise must be deemed to have abrogated and terminated all rights of the public utility under such franchise. Being terminated so far as it gave the public utility any rights and privileges as against the city and state, the franchise contract was no longer binding in favor of either city or state. A contract that has ceased to bind one of the parties no longer binds the other. It follows that the franchise between the defendant and the city of South Bend ceased to bind either party when it was surrendered and an indeterminate permit was accepted, and is no longer in force for any purpose. *Greensburg Water Co. v. Lewis*, 189 Ind. 439, 453, 128 N. E. 103, 106. * * * The mere fact that freight being transported to or from a point on the street, so that it must in any event be carried upon and along the street or some part of it by some means, whether in drays, trucks, or wagons running upon the pavement, or in cars running on rails, is hauled in freight cars operated with the consent of the city on the tracks of an interurban street railroad, does not of itself constitute an additional servitude. *Kinsey v. Union Traction Co.*, 169 Ind. 576, on pages 601, 617, 623, 624, 634, 81 N. E. 922, on pages 936, 942, 946, 947; *Pittsburg, etc., R. Co. v. Muncie, etc., T. Co.*, 174 Ind. 167, 176, 91 N. E. 600, 603; *Butler v. City of Kokomo*, 62 Ind. App. 519, 525, 113 N. E. 391, 393."

Where the original franchise and the indeterminate permit, for which it was exchanged, were both granted subject to the constitutional right of amendment, the court properly held that the state, by legislative action, had the power, after such exchange had been made, to require street railways to pave between and alongside their tracks in the leading case of *Ft. Smith Light & Traction Co. v. Board of Improvement*, 169 Ark. 690, 276 S. W. 1012, where the court said: "The act does not offend against the clause of the constitution inhibiting discrimination between parties similarly situated, because there is only one street railway in that particular locality. There is no other street car line in that particular locality to be classified, so the

doctrine of classification has no application. * * * Under the provisions of said Act 571 of 1919 appellant surrendered its charter rights, and accepted an indeterminate permit from the state to operate its street railway system, and is still operating its system under said permit. Learned counsel for appellant now contend that appellant exchanged its privileges and burdens under its original franchises of the cities for its indeterminate permit to do business, and that the state could not thereafter impose any of the original burdens contained in the franchises upon it without impairing the obligation of its contract with the state, and that Act No. 680 of 1923, which imposes the duty of paving the streets between its rails and to the ends of its ties, is void because repugnant to the clauses of the federal and state Constitutions, prohibiting the impairment of contracts. We can not agree with counsel in this position. The indeterminate permit was granted, just as the original franchises, subject to article 12, section 6, of our Constitution. * * * The burden laid by this act was just such a burden as the franchises imposed under which appellant operated, and with which it had complied before it surrendered them and accepted the indeterminate permit. The proof revealed that some of the street railways operated in the state are compelled to pave the streets between their tracks and to the ends of their ties when the streets in which they operate are required to be paved. It appears that the work was done in an economical manner. The old foundation between the tracks on Garrison avenue was utilized. There is evidence tending to show that the condition of the pavement between the tracks needed rebuilding. The evidence is sufficient to support the findings of the court."

This same case was affirmed by the Supreme Court of the United States which held that the original franchise, which was exchanged for the indeterminate permit, provided for paving between and along the tracks, and as there was no express exemption from this duty in the indeterminate permit, such an exemption would not be implied, especially as the original charter was granted subject to the right of the state to alter, amend, or repeal it under the constitution of the state. This principle is well expressed as follows in the case of *Ft. Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387, 71 L. ed. 1112, 47 Sup. Ct. 595: "Plaintiff in error originally operated its railway under a franchise requiring it to do similar paving and limiting it to a maximum fare of five cents per passenger. Availing of the permission granted by No. 571 of the Acts of Arkansas

1919, amended by No. 124 of 1921, the company had surrendered in that year its franchise for an indeterminate permit to operate its road. The permit did not fix a maximum fare or require the railway to pave parts of the streets occupied by its tracks, but subjected it to the regulatory powers of a utilities commission. In 1923 the legislature passed a statute (Acts of Arkansas 1923, No. 689) requiring plaintiff in error under certain conditions which have occurred, to pave the streets between its rails to the end of the ties. * * * It is urged that the acceptance of the indeterminate permit under the Act of 1919 constituted a contract between the railway and the state by which the state bound itself not to impose any added burdens except in the exercise of its police power; that the requirement for street paving was not an exercise of the police power and was therefore a forbidden impairment of the contract. This contention assumes that the permit exempted the railway from paving costs. But no such exemption appears in the permit. Provisions of this character are not lightly to be read into a contract between a state and a public utility. *Durham Pub. Service Co. v. Durham*, 261 U. S. 149, 152, 67 L. ed. 580, 584, 43 Sup. Ct. 290. Even granting the assumption, the case of *Fairhaven & W. R. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. 74, is a complete answer. There this court held that a general law imposing on a street railway the duty to repair so much of the streets as was occupied by its tracks was an exercise of the power reserved to the state to alter, amend or repeal the original charter and was not an impairment of the obligation of contract. That case controls here since section 6, art. 12, of the Constitution of Arkansas, in force at the time when plaintiff relinquished its franchise and accepted the permit, reserved to the legislature the power to alter any corporate charter. * * * It is said that the act in its application is confiscatory because plaintiff in error must bear this expense although it is losing money in the operation of its road at the rates for service now prevailing. But the imposition of burdens, otherwise legitimate, upon a public service company can not be held invalid as confiscatory because the permitted rate does not allow an adequate return. * * *

If a state may delegate to a municipality power to require paving by a street railway located within its limits (*Durham Pub. Serv. Co. v. Durham*, supra), we perceive no reason why it may not, by a legislative act, make a like requirement limited to a single municipality. Nor need we cite authority for the proposition that the Fourteenth Amendment does not require the uni-

form application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination. * * * There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable."

After the municipality has granted the franchise with full constitutional authority to do so, the corporation commission of the state has no power to permit its exchange for an indeterminate or revocable permit. This exchange can only be effected by the municipality which granted the franchise under such authority which requires the consent of the electors and the public utility. In holding that the statute attempting to grant the corporation commission the power to effect this exchange was unconstitutional and beyond the power of the state and in violation of the constitution of Oklahoma, the court in the case of *Cushing v. Consolidated Gas Utilities Co.*, 141 Okla. 82, 284 Pac. 38, said: "This case is an appeal from the corporation commission of Oklahoma and from an order of said corporation commission granting a revocable permit to the Consolidated Gas Utilities Company, defendant in error, in lieu of a municipal gas franchise. * * * We also hold that the corporation commission of the state of Oklahoma is without jurisdiction to permit the surrender of a municipal franchise, granted by a municipal corporation, and the receiving, in lieu thereof, by the holder of such franchise, of a revocable permit, as under the constitution of this state, the municipality granting the franchise and having the right under the constitution to grant the franchise alone has the authority by vote of the electors, as provided for in the constitution, of extending or renewing such franchise, and this right reserved in our constitution by the people to themselves can not be taken away from them by the legislature, and any act of the legislature which attempts to do so violates the letter and spirit of our constitution, and is therefore void. We therefore hold that the act of the corporation commission permitting the Consolidated Gas Utilities Company, a corporation, to surrender its municipal franchise, and receive in lieu thereof a revocable permit from the state of Oklahoma, was beyond the power and jurisdiction of the corporation commission, and that revocable permit No. 256 issued by the corporation commission on May 20, 1929, was issued in violation of the constitution of the state of Oklahoma, and that the act of the legislature under

which the same was issued is unconstitutional and void, and this cause is for that reason reversed and remanded to the corporation commission of the state of Oklahoma, with directions to cancel the revocable permit No. 256 issued May 20, 1929, to the Consolidated Gas Utilities Company, a corporation, and to dismiss said proceedings for want of jurisdiction of the corporation commission to grant said permit."

In an earlier case this same court held that an act of the legislature providing for the indeterminate permit was unconstitutional because the constitution of the state gave its municipalities the power to grant charter franchises for only twenty-five years, which might be extended for another like period. As the constitution vested this power in its municipalities and guaranteed to the people of each municipality the power to grant and renew such municipal charters, the act of the legislature providing for the indeterminate permit without limit as to the time of its existence was held to be unconstitutional because it violated the rights granted by the constitution to its municipalities and their inhabitants to grant or withhold charters for a period not exceeding twenty-five years. This decision and the reasons on which it is founded are clearly set forth as follows in the case of *Okmulgee v. Okmulgee*, 140 Okla. 88, 282 Pac. 640, P. U. R. 1930B, 65: "The question presented is the constitutionality of the irrevocable permit law. * * * All of the authorities we have been able to find hold that when a franchise is not limited in its existence to a fixed and definite period of years, then the same is a perpetual franchise. * * * The limitation specified in the constitution for a municipal charter granted by a municipality is twenty-five years, and this may be extended not exceeding twenty-five years, as provided for in the constitution, and any act of the legislature that violates section 5 (a) is repugnant to the constitution and must fall. Any act of the legislature which attempts to burden section 5 (b) which guaranties to the people the power therein reserved by them to vote a municipal charter or to renew or extend one, is likewise repugnant to the constitution and void. Any act of the legislature which provides for issuing a license, revocable permit, indeterminate permit, or other instrument in the nature of a franchise which is not limited as to its time of existence, violates section 32 of article 2 of our Constitution. We, therefore, hold that House Bill No. 4 approved March 19, 1925, and known as chapter 102 of the Session Laws 1925, is repugnant to the constitution, and is therefore void."

Where one public utility contracts with another to supply its product for distribution to the public, the former does not deal with the public either directly or indirectly and can not be said to require or have a franchise or indeterminate permit to supply the product which the second public utility distributes to its patrons. This principle indicating a limitation of the use of indeterminate permits, is found and discussed as follows in the case of *Central Wisconsin Power Co. v. Wisconsin Traction, Light, Heat &c. Co.*, 190 Wis. 557, 209 N. W. 755, P. U. R. 1927A, 76: "It is further contended that the defendant has no right to furnish electrical energy to the city of Clintonville because it has not obtained a certificate of convenience and necessity as required by the terms of section 196.50, Wis. Stats. Both the plaintiff and the defendant are public utilities. * * * The city of Clintonville had, prior to the time of entering into the contract, maintained its own plant for the generation of electrical energy. * * * The statute expressly declares that a city owning and operating an electrical plant such as the city of Clintonville owned and operated is a public utility, so that we have in this case one public utility dealing with another. In making the contract, the city acted in its proprietary capacity. In its governmental capacity, by the adopting of the ordinance, it permitted the plaintiff to use the streets of the city for the purpose of carrying out its contract with the city as a proprietor. It did not thereby grant any franchise to the plaintiff to serve the public, but reserved that function to itself. * * * Furnishing heat, light, or power to the public makes the company furnishing it a public utility; a franchise given to a public utility to furnish heat, light and power to the public is an indeterminate permit. The plaintiff did not deal with the public directly or indirectly. It dealt with the city in its proprietary capacity. * * * The mere leasing of its power to a utility was not furnishing heat, light, or power to the public. * * * A public utility which has a contract with another public utility to furnish electrical energy which the second utility distributes to the public is not furnishing it to the public so as to make its use of the streets for the purpose of delivering the energy an indeterminate permit. * * * It is also to be noted that, if the permit to occupy the streets in the city of Clintonville amounted to an indeterminate permit, there are two mutually exclusive indeterminate permits in operation within the corporate limits of that municipality at the same time, for municipalities are brought within the terms of the indeterminate permit provision of the public utility law as are private corporations. * * * The plaintiff having no

indeterminate permit, it has no exclusive right to sell electrical energy to the city of Clintonville."

While the court of Wisconsin sustained the power of the legislature by statutory enactment to require parties to a franchise contract to exchange it for an indeterminate permit, the Supreme Court of the United States, for the reason that such a contract is property and that the rights secured under it could not be forced to be exchanged under the reserved power of the state to alter, amend, or repeal the charter of the company, held that the franchise contract was created by and between the municipality and the public utility, and was property of which it could not be deprived without its consent and for the further reason that the municipality was expressly authorized by the legislature to make the contract in question, and as the municipality did not retain the right to alter, amend, or repeal such a contract, the public utility could not be forced without its consent to so modify its contract rights by exchanging them for an indeterminate permit. This principle was clearly established and discussed as follows in the leading case of *Superior Water, Light & Power Co. v. Superior, Wisconsin*, 263 U. S. 125, 68 L. ed. 204, 44 Sup. Ct. 82, where the court said: "Chapter 359, Private Laws of Wisconsin 1866, incorporated plaintiff in error's predecessor, the Superior Water Works Company, and empowered it to make 'any agreements, contracts, grants and leases for the sale, use and distribution of water as may be agreed upon between said company and any person or persons, associations and corporations, and with the town of Superior, or neighboring towns.' * * *

On October 15, 1887, in order to provide fire protection and secure pure and wholesome water, and in consideration of benefits to accrue therefrom, the village of Superior, a municipal corporation, by ordinance, granted to Superior Water Works Company, its successors and assigns, for a period of thirty years, the privilege of establishing, maintaining, and operating a complete system of waterworks. The ordinance specified the duties and obligations of the parties, and, among other things, provided that the village would abstain for thirty years from granting the right to lay water pipes in its streets to any other party. * * *

And, further, that 'at the expiration of the said thirty years, should the said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of waterworks for another term of thirty years, upon the said terms and conditions as may exist between the said village or city and the said Superior Water Works Company, at the expiration of the first thirty years, in and upon

the public grounds and streets of the said village, and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case, the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of waterworks and the property connected therewith, at a fair valuation as provided for in section 13.' Section 13 provided for arbitrators to determine the actual value of the plant, exclusive of privileges granted by the village, not to exceed what it would cost to construct the same. * * *

The corporation accepted the ordinance, constructed the plant and many extensions, spent large sums in connection therewith, and long continued to operate it. * * * October 1, 1889, with the express assent of the Superior Water Works Company, and in consideration of the waiver of certain rights by the latter, the city of Superior amended section 13, Ordinance of October 15, 1887, so as to provide that, if purchased, the price to be paid for the waterworks plant should be ascertained by capitalizing the net earnings of the preceding year at five per cent.

* * * In 1907 the Wisconsin legislature enacted the Public Utility Law (Laws 1907, chap. 499, Wis. Stat., sections 1797m-1 to 1797m-109), which created the railroad commission, a regulatory body, and authorized public utilities to surrender existing franchises, and accept in lieu thereof 'indeterminate permits.' Chapter 596, Laws 1911, repealed the optional feature of the Statute of 1907, and directed that every license, permit, or franchise granted by the state or by any town, village, or city to any corporation, authorizing the latter to operate a plant for furnishing heat, light, water, or power, etc., etc., 'is so altered and amended as to constitute and to be an 'indeterminate permit'. * * * Plaintiff in error has not voluntarily submitted to the Public Utility Law. On October 15, 1917, the prescribed thirty-year limitation expired and plaintiff in error requested the city of Superior either to grant further right to maintain the system of waterworks, or to purchase the same, as provided by the Ordinance of 1887, as amended in 1889. The city failed to make the grant; denied its obligation to purchase; and took steps under provisions of sections 1797m-1 to 1797m-109, Wisconsin Statutes, to condemn the entire plant. Thereupon plaintiff in error instituted the present cause against the city, its mayor and councilmen. The complaint sets out the foregoing facts, alleges repudiation of the obligation to purchase and the steps taken for condemnation, and asks a decree requiring the city specifically to perform its agreement, for an injunction restraining further efforts to condemn, and for general relief. The

trial court overruled a general demurrer, but this action was reversed by the Supreme Court (174 Wis. 257, 181 N. W. 113, 183 N. W. 254), which held that the Act of 1907 (chap. 499), as amended in 1911, was permissible under the reserved power to alter, amend, or repeal acts providing for formation or creation of corporations; and that it had substituted an 'indeterminate permit' for the rights granted to the plaintiff in error by the municipality. 'A new franchise was therefore granted to the defendant in lieu of its original franchise by the enactment of chap. 596, Laws 1911. Thereafter its franchise was that of the indeterminate permit, and it was subject to the provisions of the Public Utility Law. * * * Considering the opinions of this court, it seems clear enough that a valid contract resulted from the dealings between the city of Superior and plaintiff in error, whereby each became obligated to do certain specified things. The company agreed to construct, maintain, and operate an adequate waterworks system. The city obligated itself to recognize the company's exclusive right to maintain and operate the system for a definite period,—thirty years; and also to purchase the entire plant at a price fixed in the manner specified if, at the conclusion of such period, it should refuse to grant an extension. The rights so acquired by plaintiff in error were property.

* * * Concerning the relation between the parties, the court below declared: 'The franchise of the Water Company, which enables it to pursue its business of supplying water to the city of Superior and its inhabitants is a contract between it and the state.' But it held the legislature had power to change this contract under the reservation permitting alterations, in section 1, art. 11, of the state Constitution, and that the Act of 1911 did modify the contract by substituting for rights thereby secured an 'indeterminate permit.' Through its contract with the city the water company acquired valuable property rights. They were not directly created by any statute enacted under section 1, art. 11, of the state Constitution, but were the outcome of agreement with a fully empowered corporation. They did not arise from the mere exercise of a governmental function legislative in character, but from contract expressly authorized by the legislature. None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred construes the reservation in the state constitution as having the extraordinary scope accorded to it below; and certainly, in the absence of some very clear and definite pronouncement, we can not accept the view that it then had the meaning now attributed to it."

CHAPTER 12

FRANCHISE RIGHTS AVAILABLE TO INHABITANTS OF MUNICIPALITIES

Section	Section
245. Obligation of municipal franchise.	255. Nature of duty to provide service defined.
246. Duty imposed by acceptance of franchise.	256. Customer may enjoin diversion of necessary supply.
247. Municipal public utilities affected with public interest.	257. Customer entitled to service under most favorable conditions.
248. Regulation and control of municipal public utilities.	258. Rights of abutting property owner.
249. Municipal control in interest and for benefit of public.	259. Liability of municipal public utility for shade trees.
250. Limitations imposed to conserve municipal control.	260. Right of customer to enjoin collection of excessive rate.
251. Rights of inhabitants as real parties in interest.	261. Regulations inconsistent with franchise invalid.
252. Individual inhabitant's rights.	262. Liability in damages for failure to furnish adequate service.
253. Right of consumer failing to secure proper service.	263. Limitations.
254. Franchise rights available to individual customer.	

§ 245. **Obligation of municipal franchise.**—A consideration for the granting of the special franchise rights, which permit of the furnishing of municipal public utilities for municipal purposes and for the use of the inhabitants of the municipality, is the duty, thereby assumed and imposed of rendering proper public utility service to the municipality and its inhabitants. Such franchise rights and special privileges belong to and may be enjoyed only by those to whom they are especially granted by the state or by its agent, the municipality, under authority creating the agency and conferring the power to grant the special franchise privileges.

§ 246. **Duty imposed by acceptance of franchise.**—This duty of the municipal public utility to serve the public in accordance with the terms and conditions of the franchise, granting it the right to furnish public utility service, and the public regulation and control which are the means provided for securing the performance of the duty, due the municipality and its inhabitants, are imposed by virtue of the principle which has been established

in our jurisprudence for centuries and is clearly stated and applied to our modern industrial conditions in the case of *Munn v. People of Illinois*, 94 U. S. 113, 24 L. ed. 77. The old English Common Law established as one of its first and most fundamental principles that "when private property is affected with a public interest it ceases to be private only and becomes subject to public regulation and control." As the court in the *Munn* case so well expressed it: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

§ 247. **Municipal public utilities affected with public interest.**—Under this principle which has been established for the past three centuries, at least since the day of Lord Chief Justice Hale, who enunciated it, all public service corporations by virtue of the fact that they are quasi-public rather than private corporations, organized in order to serve the public in that capacity and having been granted the special franchise privileges of doing so in accordance with the terms of the grant, have been subjected to the control and regulation of the public in the interest of the public for the purpose of securing to the public the performance of the duties connected with rendering the service undertaken by the incorporation of the company and the acceptance of the special franchise privileges.

§ 248. **Regulation and control of municipal public utilities.**¹—The power conferred upon the municipality of granting the use of its streets to the municipal public utility for the purpose of permitting it to furnish its public utility service and of imposing the conditions under which the streets may be used for rendering the service is to secure proper municipal regulation and control of such service. And when the municipal public utility receives its charter from the state granting it the right to be a body corporate and accepts the special franchise rights conferred by the municipality permitting it to own and operate its

¹This section (§ 193 of 2d edition) quoted in *Central Germantown Ave. Business Assn. v. Philadelphia*

Rapid Transit Co. (Pa.) P. U. R. 1917D, 982.

public utility system, by virtue of the acceptance of such special privileges and as a consideration for them, the municipal public utility undertakes and is in duty bound to provide adequate service to all of its customers; and, for the purpose of seeing that it does so, is subjected to regulation and control at the hands of the state and by other agencies created for that purpose, including the municipality.

After receiving a franchise from a municipality permitting the merger of two competing companies and creating a monopoly for the grantee, it may not withdraw from the field and discontinue its service, nor will it be relieved of the continued duty of rendering service by its failure to agree with the municipality granting the franchise upon the proper rate for the service. After creating the public utilities commission, upon which was conferred the right of regulation including the right to withdraw service, the consent of the commission is necessary before the public utility will be permitted to discontinue its service, although the parties to the franchise may agree to a discontinuance of the service. This principle, indicating that it is for the benefit of the inhabitants of the municipality that the franchise was granted and that their best interests are to be considered and conserved, rather than the public utility or even the municipality, is enunciated as follows in the case of *Cleveland v. East Ohio Gas Co.*, 34 Ohio App. 97, 170 N. E. 586, as follows: "Under section 4, article 18, of the Constitution of Ohio, municipalities in Ohio have full right and power to make contracts with respect to the operation of utilities within their confines, and under that section of the constitution Cleveland exercised its right to make a contract. * * * There are certain products furnished the public which, in their very nature, are not competitive. A monopoly is the best thing for the public, and it is upon that theory that the two gas companies existing in Cleveland when the East Ohio Gas Company got its franchise were merged into the East Ohio Gas Company. The public is best served by a public utility having the field solely to itself, and not by competition. Now, of course, with this trend of thought on public service, the public must not be left to the rapacity of utilities corporations, so that they may demand any price and get it, because then the people would be at their mercy, and consequently rate-fixing commissions, utilities commissions, that supervise, regulate, and curb the rapacity of a utility that otherwise might squeeze the very life-blood out of the people, have come into existence. * * * Now, with this in mind, let us

remember that the present contract from which the gas company sought to withdraw without the consent of the utilities commission, was made in April, 1923, and the Miller Act, bringing gas companies under the provisions of the utilities law of Ohio, and under the domination and control of the utilities commission, was passed in 1919, after the Akron case was decided. * * * In other words, if the legislature has seen fit, under the broad power known as the police power, in order to regulate the utilities in the interest of the health, comfort, and convenience of the people, to impose certain restrictions upon the discontinuing of service of a utility, can that legislative act be defeated by a contract between the contracting parties? We think not, and we think the Supreme Court of Ohio has recently spoken upon that question. * * * A contract was entered into freely between the city of Cleveland and the East Ohio Gas Company, and it lasted through the entire period of its specified duration, and now, for some reason, the city and the gas company can not agree upon a rate, and the gas company apparently wishes to withdraw. * * * And it must be remembered and always kept in mind that the real parties in interest in this lawsuit are the 200,000 users of the gas. The city will not be commodored; nor will the state. It will be the people who pay the gas company, who have piped their homes and furnished the equipment at the expense of millions, that will be damaged by the withdrawal of service. * * * The legislature of Ohio, the supreme power of the state of Ohio within the Constitutions of Ohio and the United States, has put the regulation of this withdrawal of service into the hands of the public utilities commission of Ohio, and the Miller Law was passed for the very purpose of having this effect."

§ 249. **Municipal control in interest and for benefit of public.**²—The franchise rights are granted not as a special privilege in the interest and for the peculiar benefit of the public service corporation alone, but such rights are also granted by the public generally to whom they belong for the special benefit and advantage of the public and the individual members composing it. These special benefits conferred in the franchise grants carry with them the duty and burden of rendering adequate service to the public on reasonable terms and conditions; and one of the chief duties of the municipal and state authorities is to require

² This section (§ 194 of 2d edition) quoted in *Central Germantown Ave. Business Assn. v. Philadelphia*

Rapid Transit Co. (Pa.), P. U. R. 1917D, 982.

such service in the interest of the municipality and its inhabitants. The power of regulation and control is vested in them for this purpose exclusively, and not for the purpose of being surrendered or bartered away; and, that this power may be conserved in the municipality, the law has provided many checks and restrictions, including those already discussed limiting the power of the municipality to incur only a fixed indebtedness; to make contracts and grant franchises only which are not exclusive unless the municipality be clearly empowered to make them exclusive, and then only in such cases where it is clearly apparent that the intention was to make the contract or franchise exclusive; and further in most jurisdictions to make a contract or grant a franchise only for a reasonable period and not in perpetuity unless the power and the intention is clearly apparent that they may continue perpetually.

§ 250. Limitations imposed to conserve municipal control.—Further restrictions, to be noted later in this discussion, which are imposed for the purpose of conserving the power of regulation and control in the public and especially in the municipality as the means of securing efficient service on reasonable terms are the limitations placed on the public service corporation to assign its franchise rights, to lease or sell its property, or in any way to hamper or disable itself from performing its duty to the public in rendering proper service—all of which are for the purpose of protecting the interests of the public and its members in securing the performance of the obligations due it from the public service corporations.

For the purpose of conserving the power of regulation and control of public utilities in the public, and especially in the municipality, provision is made in a number of the states for a referendum of the voters in matters concerning the granting of a franchise and the fixing or regulating of the rates for the service to be rendered under the franchise, and the courts will not hesitate to require the submission of such questions to the voters in the form of a referendum, as was indicated in the case of *Southern Cities Distributing Co. v. Carter* (Ark.), 44 S. W. (2d) 362, P. U. R. 1932B, 155, where the court said: "It then became a matter of public concern and part of the procedure necessary to invoke the referendum in determining the justness and reasonableness of the rates allowed to be charged under the resolution by the appellant company by approval or rejection of the resolution fixing rates for the people within the city granting the franchise therefor. It is not questioned that the petitions for

the referendum were sufficient, containing the number of qualified voters required under the constitution before the names were wrongfully withdrawn and allowed to be stricken off by the city council on July 8, 1930, after the expiration of the time for filing thereof, which, of course, had no right to refuse to grant the petition and deny the referendum on any such grounds. * * * It is next insisted that the resolution granting the increase in gas rates is not subject to the referendum, but this contention is without merit. * * * Such language necessarily includes a resolution of the city council granting an increase of rates to the public utility for supplying and distributing gas to the people of the city under its contractual rights to do so, being but an extension or enlargement of its franchise. * * * The making or fixing of rates is an act legislative and not judicial in kind within the meaning of this constitutional amendment. * * * The purpose and effect of the referendum is only to allow the approval or rejection of the resolution and rates fixed therein by the council by vote of the people, who are not expected, of course, to establish a reasonable rate or rates in such referendum, but only to lend their approval to such rates as fixed or proposed, or reject them by their votes. * * * There is no evidence of any act or conduct of the city indicating the surrender or release of its right to regulate the rates charged by public utilities to its citizens for furnishing gas. *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P. U. R. 1915D, 591, 35 Sup. Ct. 820. The general assembly had power even under the constitution permitting the revocation and annulment of charters found to be injurious to the citizens of the state to permit the change and amendment of any franchise granted by any city attempting to bind itself irrevocably to any agreed schedule of charges or rates, regardless of the necessity that might exist for the regulation thereof. It follows from what has been said that the judgment of the circuit court in issuing the mandamus to compel the granting of the referendum upon the resolution or ordinance of the city increasing the rates allowed to be charged the consumers in the distribution of gas was correct, and the judgment must be affirmed."

§ 251. **Rights of inhabitants as real parties in interest.**—The rights thus created and the consequent duties imposed on the public service corporation are generally available to the inhabitants of the municipality as well as to the municipality itself; indeed, they are the real parties in interest for whom the con-

tract is made, which results from the acceptance of the franchise by the public service corporation. These rights will be enforced by the courts on the petition of the individual inhabitant or the municipality that is denied adequate service on reasonable conditions by means of a mandamus proceeding, or by a writ of injunction where the service is about to be discontinued after resort has been made to the public utility commission. Public utility service, whether rendered by a private corporation or the municipality itself, must be provided to all who apply and are willing to pay for it under such terms and conditions as may be reasonably imposed.

The municipality acting for its inhabitants has the right to bring legal proceedings to prevent the discontinuance of service especially where this would interfere with its educational system's being properly carried out, for as the court said in the case of *West Rutland v. Rutland R., Light & Power Co.*, 98 Vt. 379, 127 Atl. 883: "We think it sufficiently appears that the town representing the public in that immediate locality for whose benefit in part the road was constructed and has been operated may properly join in this proceeding to protect such public rights. This would be so under the holding in *Bridgeton v. Bridgeton &c. Ry. Co.*, 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837, which, although a proceeding for mandamus, involves the principle here recognized. * * * And more than this, in the instant case, the allegations clearly show that the proposed discontinuance of service by the defendant will seriously interfere with the education of the children residing in the plaintiff town, a matter in which the town is directly and vitally interested by reason of the duty relating thereto delegated to it by the state, the expense of which, largely, it, by law, must bear."

§ 252. Individual inhabitant's rights.—Each inhabitant, whether an owner or a tenant of property, should have the right to contract for service in his own name within reason, although naturally where there are a large number of tenants of a transient nature occupying only one or two rooms of a large building, a reasonable regulation may permit the company to contract only with the party owning or controlling the entire structure. These are matters of administration and are determined by a practical application of what is just and reasonable under the circumstances of the particular case where an established practice or general custom is generally controlling. Where, however, the corporation providing the service receives an application for its service and the customer complies with the reasonable rules

and regulations on his part a contract results which requires that adequate service be rendered in accordance with the prevailing terms and conditions; and as before suggested, default on the part of the municipal public utility gives a right of action in the form of mandamus or injunction, and where special injury results from such failure, the party suffering the injury may recover compensation in damages.³

³ **United States.** *Southwestern Tel. & T. Co. v. Danaher*, 238 U. S. 482, 59 L. ed. 1419, 35 Sup. Ct. 886, Ann. Cas. 1916A, 1208; *Fort Smith Light & C. Co. v. Bourland*, 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249, rehearing denied and opinion amended in 268 U. S. 676, 69 L. ed. 631, 45 Sup. Ct. 511; *People of New York v. Public Service Comm.*, 269 U. S. 244, 70 L. ed. 255, 46 Sup. Ct. 83.

Federal. *Postal Cable Tel. Co. v. Cumberland Tel. & T. Co.*, 177 Fed. 726; *Attleboro Steam & C. Co. v. Narragansett Elec. Lighting Co.*, 295 Fed. 895; *Tulsa v. Oklahoma Nat. Gas Co.*, 4 Fed. (2d) 399, dis. in 269 U. S. 527, 70 L. ed. 395, 46 Sup. Ct. 17; *United States v. Tujunga Water & C. Co.*, 18 Fed. (2d) 120; *Todd v. Citizens Gas Co.*, 46 Fed. (2d) 855; *United States Light & C. Corp. v. Niagara Falls Gas & C. Co.*, 23 Fed. (2d) 719, P. U. R. 1927E, 749, P. U. R. 1931B, 127.

Alabama. *Alabama Water Co. v. Jasper*, 211 Ala. 280, 100 So. 486; *Wiggins v. Alabama Power Co.*, 214 Ala. 160, 107 So. 85; *Birmingham Elec. Co. v. Allen*, 217 Ala. 607, 117 So. 199; *Alabama Water Service Co. v. Harris*, 221 Ala. 516, 129 So. 5; *Birmingham v. Birmingham Water Works Co. (Ala.)*, 42 So. 10.

Arkansas. *Carson v. Ft. Smith Light & C. Co.*, 108 Ark. 452, 158 S. W. 129, Ann. Cas. 1915B, 92; *Arkansas-Missouri Power Co. v. Brown*, 176 Ark. 774, 4 S. W. (2d) 15, P. U. R. 1928D, 6; *Cherokee Public Service Co. v. West Helena (Ark.)*, 41 S. W. (2d) 773; *Southern Cities' Distributing Co. v. Carter (Ark.)*, 44 S. W. (2d) 362, P. U. R. 1932B, 155.

Florida. *Miami Gas Co. v. Highleyman*, 77 Fla. 523, 81 So. 775, P. U. R. 1919E, 626.

Georgia. *Freeman v. Macon Gas Light & C. Co.*, 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917; *Young v. Moultrie*, 163 Ga. 829, 137 S. E. 257; *John P. King Mfg. Co. v. Augusta*, 164 Ga. 306, 138 S. E. 159; *Georgia Power Co. v. Decatur*, 168 Pa. 705, 149 S. E. 32, P. U. R. 1929C, 460; *Georgia Power Co. v. Rome*, 172 Ga. 14, 157 S. E. 283.

Indiana. *Portland Nat. Gas Co. v. State*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639; *Westfield Gas & C. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *State v. Consumers Gas Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; *Indiana Nat. & C. Gas Co. v. State*, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761; *Public Service Comm. v. Girton*, 189 Ind. 627, 128 N. E. 690, P. U. R. 1921B, 16.

Iowa. *Meador v. Sibley*, 197 Iowa 945, 198 N. W. 72.

Kentucky. *Cumberland Tel. & T. Co. v. Hickman*, 129 Ky. 220, 111 S. W. 311; *Georgetown v. Georgetown Water & C. Co.*, 134 Ky. 608, 121 S. W. 428, 24 L. R. A. (N. S.) 303; *Marion Elec. Light & C. Co. v. Rochester*, 149 Ky. 810, 149 S. W. 977; *Humphreys v. Central Kentucky Nat. Gas Co.*, 190 Ky. 733, 229 S. W. 117, 21 A. L. R. 664; *Louisville Gas & C. Co. v. Sherman*, 202 Ky. 648, 261 S. W. 1; *Louisville Gas & C. Co. v. Mobley*, 205 Ky. 603, 266 S. W. 243; *Burford v. Glasgow Water Co.*, 223 Ky. 54, 2 S. W. (2d) 1027; *Ludlow v. Union Light, Heat & C. Co.*, 231 Ky. 813, 22 S. W. (2d) 909; *Russell v. Kentucky Utilities Co.*, 231 Ky. 820, 22 S. W. (2d) 289, P. U. R. 1930B, 400; *Smith v. Kentucky Utilities Co.*, 233 Ky. 68, 24 S. W. (2d)

928; Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co., 32 Ky. L. 1357, 108 S. W. 875.

Louisiana. Martin v. Louisiana Public Utilities Co. (La.), 127 So. 470.

Maine. Kimball v. Northeast Harbor Water Co., 107 Maine 467, 78 Atl. 865, 32 L. R. A. (N. S.) 805.

Maryland. Chas. Simon's Sons Co. v. Maryland Tel. & T. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

Massachusetts. Souther v. Gloucester, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309.

Michigan. Rice v. Detroit, Y. & C. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84; Bolender v. Southern Michigan Tel. Co., 182 Mich. 646, 148 N. W. 697; Saginaw v. Consumers Power Co., 213 Mich. 460, 182 N. W. 146, P. U. R. 1921E, 281.

Minnesota. State v. Waseca, 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 437; St. Paul Realty & Co. v. Tri State Tel. & T. Co., 122 Minn. 424, 142 N. W. 807; Red Wing v. Wisconsin-Minnesota Light & Co., 139 Minn. 240, 166 N. W. 175.

Mississippi. Mississippi Power & Co. v. Maulding, 143 Miss. 371, 108 So. 901.

Missouri. Rogers Iron Works v. Joplin Waterworks Co., 323 Mo. 122, 18 S. W. (2d) 420; Bowers v. Kansas City Public Service Co. (Mo.), 41 S. W. (2d) 810; State v. Graeme, 130 Mo. App. 138, 108 S. W. 1131; Reber v. Bell Tel. Co., 196 Mo. App. 69, 190 S. W. 612.

Montana. State v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. 574.

Nebraska. American Water Works Co. v. State, 46 Nebr. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. 610; Slabaugh v. Omaha Elec. Light & Co., 87 Nebr. 805, 128 N. W. 505, 30 L. R. A. (N. S.) 1084.

New Jersey. Boonton v. Boonton Water Co., 69 N. J. Eq. 23, 61 Atl. 390.

New York. Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504; Rochester Tel. Co. v. Ross, 195 N. Y. 429, 88 N. E. 793; Inter-

national R. Co. v. Rann, 224 N. Y. 83, 120 N. E. 153, P. U. R. 1918F, 694; Wood v. New York Inter-Urban Water Co., 157 App. Div. 407, 142 N. Y. S. 626; Freeport v. Nassau & C. Lighting Co., 111 Misc. 671, 181 N. Y. S. 830, P. U. R. 1920D, 852; Morrell v. Brooklyn Borough Gas Co., 113 Misc. 72, 184 N. Y. S. 654, P. U. R. 1921D, 310, affd. in 231 N. Y. 405, 132 N. E. 130; Pavilion Nat. Gas Co. v. Hurst, 123 Misc. 477, 205 N. Y. S. 847.

North Carolina. Moore v. Carolina Power & Co., 163 N. Car. 300, 79 S. E. 596; Mabe v. Winston-Salem, 190 N. Car. 486, 130 S. E. 169; Holmes Elec. Co. v. Carolina Power & Co., 197 N. Car. 766, 150 S. E. 621.

North Dakota. Great Northern R. Co. v. Cheyenne Tel. Co., 27 N. Dak. 256, 145 N. W. 1062.

Ohio. Phelps v. Logan Nat. Gas & Co., 101 Ohio St. 144, 128 N. E. 58, P. U. R. 1920F, 322; East Ohio Gas Co. v. Cleveland, 106 Ohio St. 489, 140 N. E. 410, 20 O. L. R. 499; Amelia v. Hicks, 7 Ohio App. 132, 30 C. D. (40 C. R.) 441, 28 O. C. A. 582, motion to certify overruled in 61 Bull. 27, 13 O. L. R. 568; Cleveland v. East Ohio Gas Co., 34 Ohio App. 97, 170 N. E. 586.

Pennsylvania. Central German-town Ave. Business Assn. v. Philadelphia Rapid Transit Co. (Pa.), P. U. R. 1917D, 982.

South Carolina. Spartanburg v. South Carolina Gas & Co., 130 S. Car. 125, 125 S. E. 295; State v. Broad River Power Co., 157 S. Car. 1, 153 S. E. 537, P. U. R. 1930A, 65; Seabrook v. Carolina Power & Co., 159 S. Car. 1, 156 S. E. 1.

Texas. Fort Worth Gas Co. v. Latex Oil & Co. (Tex.), 299 S. W. 705; Barnhart v. Hidalgo County Water Improvement Dist. No. 4 (Tex.), 278 S. W. 499; Arneson v. Shary (Tex.), 32 S. W. (2d) 907; Phillips v. Cameron County Water Improvement Dist., No. 2 (Tex. Civ. App.), 5 S. W. (2d) 557.

Vermont. Bourke v. Olcott Water Co., 84 Vt. 121, 78 Atl. 715, 33 L. R. A. (N. S.) 1015, Ann. Cas. 1912D,

§ 253. Rights of consumer failing to secure proper service.—

The general principle of permitting recovery for a failure to render proper service by the individual customer is well expressed in the case of *Freeman v. Macon Gas Light &c. Co.*, 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917, decided in 1906, where the court said: "In the present case, it affirmatively appears that the contract relied on by the plaintiff was made in pursuance of express authority conferred by the legislature upon the municipality to grant a franchise upon certain terms, one of which was that private consumers should be furnished water at rates to be fixed by the city in the contract with the Macon Gas Light & Water Company. The water company, by entering into the contract which the general assembly authorized the city to make with that company, accepted the privilege of supplying the citizens of that city, as such, with water upon certain terms, and became a public service corporation with an express statutory duty to perform. This duty the company owed to every private consumer of water, independently of any contract duty it owed to the municipality itself, considered as a municipal corporation engaged in the discharge of governmental functions. For a breach of this statutory duty, the company could be held liable in tort by the aggrieved member of the public, though he was no party to the contract between the city and the water company."

The public service commission with the consent of the city and public utility may change the rates for service without the consent of the customer, for as is held in the case of *International R. Co. v. Rann*, 224 N. Y. 83, 120 N. E. 153, P. U. R. 1919B, 830: "The public service commission may, with the consent of the local authorities evidenced as provided by law, increase rates of fare previously agreed upon by street railroad corporations and the city. The regulations as to rates of fare are conditions upon which the railroads exercise their franchises. They are not immutable. *Matter of Quinby v. Public Service Commission*, 223 N. Y. 244, 119 N. E. 433. * * * The rate of fare provision of the Milburn agreement unquestionably secures valuable rights to the inhabitants of Buffalo which they did not previously possess. The city owing or assuming to owe to its inhabitants, the patrons of the street railroad companies, the duty of

108; *West Rutland v. Rutland R. Light &c. Co.*, 98 Vt. 379, 127 Atl. 883.

Virginia. Hampton v. Newport News & H. R. Gas &c. Co., 144 Va.

29, 131 S. E. 328; *Cantrell v. Appalachian Power Co.*, 148 Va. 431, 139 S. E. 247.

Wisconsin. Hurlbut v. Union Tel. Co., 168 Wis. 125, 169 N. W. 308.

obtaining more favorable rates, entered into an agreement for their benefit which they may enforce. *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 338, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504; *Rigney v. N. Y. C. & H. R. R Co.*, 217 N. Y. 31, 111 N. E. 226. The nature, from a legal standpoint, of such an agreement is well stated in *Adams v. Union Ry.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273. * * * The agreement confers rights upon the city of Buffalo. The city may terminate it for nonperformance, or it may release the railroad companies from performance or consent to modify its terms, or it may compel performance by suit. *Wash. Co. Water Co. v. Hagerstown*, 116 Md. 497, 82 Atl. 826, Ann. Cas. 1913C, 1022. The city is the real party to the agreement. The individual inhabitants are not, nor can they become, parties thereto. They merely have the benefit of it while it remains in force. * * * As a legal conception, the corporation is an entity distinct from its inhabitants, but it remains a local community, a body of persons, the sum total of its inhabitants and the proper custodian and guardian of their collective rights. 'Every municipal corporation has a twofold character, the one governmental, the other private.' 19 R. C. L. 697. In its governmental capacity it may command; in its private character, as a collection of individuals, it must sometimes barter and bargain. The Milburn agreement is the result of bargaining between the people of the city of Buffalo, represented by the municipal authorities on one hand, and the street railroad companies on the other."

The right of the inhabitant to service is subject to the power of the city and the public utility to change the terms of the contract, for as the court said in *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 128 N. E. 58, P. U. R. 1920F, 322: "In passing it may be observed that the contracts of a municipal corporation, unless limited by positive provisions of statute law, are governed by the same principles as apply to contracts between individuals. As between the latter, parties competent to contract are competent to modify or to abrogate the contracts, so far as executory, between them made; the consideration therefor being found in the mutual waivers of rights thereunder. Page on Contracts, section 317. It follows that the ordinance of the city of Findlay of October 18, 1918, abrogating, with the consent of the gas company, the prior contract, still partly executory, made by the passage and acceptance of the rate ordinance of June 1914, violated no principle of the law of contracts, and was not open to attack on general grounds by the individual tax-

payer or gas consumer, suing either in his personal right, or, as here, on behalf of the public. * * * For the reasons assigned, it must be concluded that the ordinance of the city of Findlay of October, 1918, having been accepted by the gas company, was a valid exercise of municipal power. By the terms of that ordinance thus accepted, the pre-existing contract between the city and the gas company was abrogated, and ceased to be the subject of specific performance at the instance of any party or person whomsoever."

§ 254. Franchise rights available to individual customer.— That the contract resulting from the acceptance of the franchise granted by the municipality creates rights which become available to the individual customer receiving such service who may insist on the service being rendered in accordance with the rights thus fixed and determined is the effect of the decision in the case of *Westfield Gas & Milling Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033, decided in 1895, as follows: "By an act of the legislature approved March 7, 1887 (Acts 1887, p. 36; Rev. St. 1894, § 4306), incorporated towns and cities are empowered to enact a general ordinance to reasonably regulate the supply, distribution, and consumption of natural gas within their respective corporate limits, and to require a fee of the persons or companies for the use of the streets granted to them by these municipalities. * * * The town had the right, in granting the use of its streets, to impose such reasonable requirements, terms, regulations, and conditions therein upon those accepting the privileges and benefits of the grant as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers. The authority to prescribe such terms and conditions, if not expressly conferred by the act of 1887, may at least be reasonably inferred therefrom, in order that the full force and effect may be given to the power expressly granted.⁴ * * * Having accepted the franchise granted by the ordinance, and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privileges under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town who desire to use its fuel upon the ground that they refuse to pay a price therefor

⁴ *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. 214; *Indianapolis v. Consumers Gas Trust Co.*, 140 Ind.

107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. 183, and authorities there cited.

in excess of the maximum rate fixed by the ordinance. The town could not, by its subsequent action, impair or restrict the rights granted to, accepted, and exercised by appellant. Neither will the latter be permitted, under the circumstances, to decline to comply with the terms or conditions assumed, by which it is expressly obligated."

This principle is well stated in the case of *Cumberland Tel. & T. Co. v. Hickman*, 129 Ky. 220, 111 S. W. 311, decided in 1908, where in holding that having accepted the contract and having enjoyed the privileges granted by the franchise the company will not be permitted to repudiate any of its terms, the court said: "In this case, as part of the consideration for the grant of the franchise, there is a contract of the grantee to furnish certain classes of persons certain valuable privileges. The contract was made for their benefit, and based upon a valuable consideration. They may sue in their behalf, and one or more may sue for all, or the city might have maintained the suit, as it was the party with whom the contract was made."

That the inhabitants are the real parties in interest and may enter suit on public utility contracts is well expressed in *Miami Gas Co. v. Highleyman*, 77 Fla. 523, 81 So. 775, P. U. R. 1919E, 626: "The contract with the city was made for the benefit of its residents, including complainants, and they are proper parties to enforce their rights thereunder, being the real parties in interest. * * * The bill of complaint and answer show a breach of the franchise contract by the defendant gas company. It is manifest that the contract contemplated the furnishing of the meter service as a part of the undertaking to furnish gas to consumers, and that the contract charge for gas covered the meter service, the privilege of rendering the service being a franchise carrying exclusive rights. If the changed conditions cause the contract to work a hardship on the defendant, the courts may not, for that reason, decline to enforce the rights of parties under the contract voluntarily entered into by the defendant. See *Columbus Ry. & Co. v. City of Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. ed. 669."

The right of the individual inhabitant to sue on such a contract for public utility service is upheld in the case of *Morrell v. Brooklyn Borough Gas Co.*, 113 Misc. 72, 184 N. Y. S. 656, P. U. R. 1921D, 310⁵: "The franchise constitutes a contract between the city and the gas corporation for the benefit of the inhabitants or

⁵ Affirmed in 231 N. Y. 405, 132 N. E. 130.

consumers of gas, and where by the terms of the franchise the corporation undertakes to furnish gas at a specified rate, the inhabitants of the city may maintain an action against the corporation to enforce compliance therewith. *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504; *Farnsworth v. Boro Oil & Gas Co.*, 216 N. Y. 40, 109 N. E. 860. In the absence of any provision in the franchise as to the rate at which gas is to be sold, it seems to me that an undertaking by the corporation to furnish gas at a fair and reasonable rate must necessarily be implied from the acceptance and enjoyment of the franchise by the corporation. The city acts as trustee for the inhabitants in entering into such contract with the gas corporation, and remains custodian and guardian of their collective contract right to have gas furnished at a reasonable rate. The city, as trustee, may sue the gas corporation to enforce the latter's agreement to supply gas at a reasonable rate, which arises from the acceptance and enjoyment of its franchise to maintain its pipes in public streets."

A competitor is not a consumer and can not enforce the rights of a consumer by compelling the competing company to furnish it with service in order that it may serve members of the public individually, for the relation is determined as that of one public utility against another and not as an individual consumer against the public utility. This principle is clearly established as follows in the case of *Rogers Iron Works v. Joplin Waterworks Co.*, 323 Mo. 122, 18 S. W. (2d) 420, where the court said: "It may be that appellant would be entitled to the connection asked for in order to get water necessary to the operation of its manufacturing plant during an emergency, but, when it is selling water in competition with the water company, to customers in the franchise territory of the water company, a different question is presented. This exact question was decided in *People ex rel. New York Edison Co. v. Public Service Commission et al.*, 191 App. Div. 237, 181 N. Y. S. 259. In that case, *Acker et al.*, a partnership, had a private electric generating plant from which it supplied itself and its tenants with electric current. It also sold electricity to other customers in the same block. The public service commission ordered relator to furnish said partnership a breakdown service. On review, the order of the commission was reversed. * * * If appellant were demanding a water service sufficient for the operation of its manufacturing plant, it, as a member of the general public, would be entitled to such service. On the other hand, when appellant steps aside and essays

to engage in selling water to members of the general public in competition with the water company, it will not, in such capacity, be regarded as a member of the general public, but as a competitor of the water company, and its rights in the premises must be measured by the law which determines the rights of one public service corporation against another, and not by the law which fixes the rights of a member of the general public against a public service corporation. * * * It would not accord with reason or justice to say that the water company must furnish water to appellant, a competing company, to enable it to perform its own private contract, and we decline to so hold."

While the rights of individual customers to receive proper service is the chief purpose and ultimate aim in granting franchises, the exact method, involving questions of management and the policy of operation, are business matters which belong to the public utility undertaking to render the service, and so long as proper service is furnished, the court will not interfere with the operation of the plant or attempt to direct its business methods, for as the court said in the case of *United States v. Tujunga Water & Power Co.*, 18 Fed. (2d) 120: "The supplying of communities, either thickly or sparsely inhabited, with water for domestic and yard irrigation, is fairly within the main object to be accomplished. It is not that the government is interested in having constructed conduits and storage reservoirs of the exact and particular kind contemplated by the parties who make locations on government land; if, within the general plan outlined by the maps of location, substantial improvements are made, which are of practical use to an irrigation company in its business of supplying water to the inhabitants of the particular territory, the requirements of the statute are satisfied and the rights obtained may not be disturbed. * * * The dam performed its function to a practical extent, and was a real improvement in the system for the collection of water. The claim of the government is not that the dam, tunnel, and conduit were so seldom made use of as to show a legal abandonment of the locations, but solely that the improvement as planned and shown by the maps had never been completed. From what has been stated herein, this claim can not be maintained in the face of the facts as they have been adverted to. Hence I conclude that, as to the location of the reservoir and dam site known as No. 1 and the tunnel, and conduits leading therefrom to and across the boundary of the government land, defendant is entitled to the decree."

§ 255. **Nature of duty to provide service defined.**—By way of defining the nature of the public utility service which the company is obliged to render under its franchise, the court in the case of *Kimball v. Northeast Harbor Water Co.*, 107 Maine 467, 78 Atl. 865, 32 L. R. A. (N. S.) 805, decided in 1911, in holding that the use of water for operating an elevator in a hotel was a "domestic purpose" and that the company was accordingly bound to furnish service for that use, said: "It is not the manner of the use, but its purpose, which is the determining test. Is it to be used for the necessity, cleanliness, health, comfort or convenience of the house and its appurtenances or of the household? If so, it is a domestic purpose. And it can make no difference whether it be a private home or a hotel, which in this sense is but a large household, a temporary home for a greater number of people. An elevator in a private house is a convenience; in a hotel is almost, if not quite a necessity. It promotes the personal comfort of the proprietor, his family, servants and guests. It is a domestic labor-saving device, and the use of water in propelling such elevator would certainly seem to be embraced in the term 'domestic.'"

§ 256. **Customer may enjoin diversion of necessary supply.**—By way of a further definition of the nature of the service to which the customer is entitled and as a practical application of the principle permitting him to enjoin action on the part of the public service corporation which would have the effect of interfering with the service it is bound to render, the case of *Boonton v. Boonton Water Co.*, 69 N. J. Eq. 23, 61 Atl. 390, decided in 1904, held that such a customer may enjoin the company from furnishing water for the supply of railway locomotives and for the generation of motive power because such use would disable the company from furnishing an adequate supply for domestic and other purposes for which the plant was established and the franchise granted, although the court indicated that if a supply adequate for both domestic purposes and for the creation of motor power and for locomotives could be secured it would not enjoin the company from furnishing its service for the other purposes because in that event it would not interfere with the furnishing of adequate service for the former purpose. In the course of its decision the court observed: "In short, I think the words 'business and factory use' are confined to domestic uses as found in factories and places of business, namely, drinking, washing, flushing waterclosets, and the like. It would be quite impracticable to make a list, and annex it to the contract, of all

the different kinds of factories and places of business that might need water, and I am therefore of the opinion that those expressions do not help the defendant, and that the defendant has no right to use any of its water for the supply of the engines of the railway company or the motors that drive the printing presses, or the ventilating fans, or any other mechanical purposes, or the washing of hats—I had some doubts of that at first, but reflection has removed it—so long as there shall be any deficiency of water in the higher parts of the town.”

§ 257. **Customer entitled to service under most favorable conditions.**—An interesting practical illustration of the right of the customer to receive service under the most favorable conditions provided for in the franchise is furnished by the case of *Rice v. Detroit, Y. & C. R. Co.*, 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84, decided in 1900, where the conductor in charge of defendant's car, not having a supply of tickets, exacted a larger cash fare than the price of the ticket, of which the court said: “We have, then, a case in which defendant is operating under a franchise imposing a duty to sell five tickets for fifty cents, good between the city hall, Detroit, and any point in the village of Dearborn. The franchise further provided, ‘All such tickets shall be kept for sale upon each and every car operated by it.’ * * * The franchise is in the nature of a contract, and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce.”

The decision in the case of *Chas. Simon's Sons Co. v. Maryland Tel. & T. Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727, decided in 1904, observes with propriety that “it can not be here objected by the appellee that the regulation contained in the ordinance here in question as to rates of charge was not a reasonable one. The time to have urged such a consideration was before it accepted the ordinance and availed of the privileges it acquired thereunder.”

§ 258. **Rights of abutting property owner.**—The right of the abutting property owner to recover damages for the removal of shade trees by a public utility providing telephone service is determined by the case of *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131, decided in 1908, which in accordance with the general rule held that the public utility as well as the public generally only enjoy an easement in the use of the street for the purpose of transportation and communication but that the title and the right to use and enjoy the property subject to this

easement belongs to the abutting property owner which permits him to maintain shade trees, for as the court said: "The telephone company occupied the street as a mere licensee. Watson, the owner of the abutting lot, owned the fee to the center of the street, subject to the easement of the town of Republic, and had a right to plant the trees inside the curb line and thus occupy the street jointly with the town, subject, of course, to the right of the town to remove the trees should they incommode the public in the use of the street. The right of the telephone company to occupy the street with its poles and wires was therefore subordinate to the right of Watson, the property owner to have the trees in the street; that is, if to construct or maintain its line the telephone company should be obliged to remove or damage the trees, it would be bound to respond to Watson in damages."

The right of the abutting property owner to damages for injury to shade trees is further defined in the case of *Moore v. Carolina Power & Light Co.*, 163 N. Car. 300, 79 S. E. 596: "It is also true that the defendant company is empowered by its charter and by the permission of the city to place its poles and wires along the streets for the purpose of carrying the electric light. But it does not follow that therefore it can invade the property rights of the plaintiff in his shade tree without compensation, nor that the plaintiff would not be entitled to an injunction in case the cutting of the tree was about to be done unnecessarily or wantonly or oppressively. The defendant is a public service corporation, or as it is usually termed a quasi-public corporation, and can take the property of the plaintiff but only upon compensation. This is true even if it had been necessary for the defendant to run its wires through the tree and to cut the limbs, for the defendant can not invade the property rights of the plaintiff without compensation because convenient or necessary for its benefit to do so. As a matter of fact it could not be necessary, because the wires could have been strung above the top of the tree, or could have swerved to either side, or could have been placed under ground, as is required in many cities and even in North Carolina in progressive towns like Charlotte for instance, on some of its streets. * * * The plaintiff is entitled to compensation for the injury done him, and, if there was wantonness, or oppression, or other bad motive punitive damages might be added."

§ 259. Liability of municipal public utility for shade trees.—
The liability of a public utility company to pay for the loss re-

sulting from the trimming of shade trees although authority to trim them where necessary had been granted is defined in the case of *Slabaugh v. Omaha Electric Light &c. Co.*, 87 Nebr. 805, 128 N. W. 505, 30 L. R. A. (N. S.) 1084, decided in 1910, where the court said: "The city of Omaha holds title to its streets and alleys in trust for the benefit of the public.⁶ The city council had authority to grant the defendant's assignor a right-of-way over the streets and alleys in the city for the construction and maintenance of the poles and wires in question; and the use of those streets for that purpose is a public use.⁷ If the defendant had the right under its franchise to trim the plaintiff's trees, but in the exercise of that authority it damaged her property, it should respond in damages under section 21 of article 1 of the Constitution, which reads: 'The property of no person shall be taken or damaged for public use without just compensation therefor.'"

Injury to shade trees gives the owner a right to recover damages therefor against a public utility for as the court in the case of *Reber v. Bell Tel. Co.*, 196 Mo. App. 69, 190 S. W. 612, said: "Defendant, as a quasi-public corporation was entitled to erect its poles along the street and string wires thereon, under license from the municipality, but this right was subject to that of plaintiff, as an abutting property owner, to maintain trees situated as were these. And in no event could defendant take the law into its own hands, and disfigure, mutilate, and damage her trees at will, without being liable to respond in damages therefor. See *McAntire v. Joplin Telephone Co.*, 75 Mo. App. 535; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *Reinhoff v. Gas & Electric Co.*, 177 Mo. App. 417, 162 S. W. 761. It is said that the wires in question could have been placed on the new poles at a height of thirty feet—the height of the old poles—without any material interference by the limbs of these trees. And it appears that defendant might have maintained its wires at a new level of forty-five feet without damaging plaintiff's trees, by use of a cable at this place. And it has been held that such measures, where practical, must be resorted to, even though they are more expensive or less convenient, in order to avoid the cutting of trees of abutting property owners. See *Van Siclen v. Electric Light Co.*, 45 App. Div. 1, 61 N. Y. S. 210, affirmed in 168 N. Y. 650, 61 N. E. 1135; *Moore v. Carolina*

⁶ *Jaynes v. Omaha St. R. Co.*, 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751.

⁷ *Plattsmouth v. Nebraska Tel. Co.*, 80 Nebr. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654, 127 Am. St. 779.

Light & Power Co., 163 N. C. 300, 79 S. E. 596. But in the case before us, whatever may have been defendant's right, had it taken lawful steps to secure them, it is entirely clear that if, in disregard of plaintiff's rights, defendant, taking the law into his own hands, cut and injured plaintiff's trees in order to place its wires as it chose, it thereby made itself liable to plaintiff for the damage thus occasioned."

§ 260. **Right of customer to enjoin collection of excessive rate.**—The case of *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 961, decided in 1906, furnishes an interesting statement of the principle defining the rights of customers to receive service strictly in accordance with the terms and conditions provided in the franchise. In this decision the court used the following language: "The plaintiff, a resident of the village of Pelham Manor, Westchester county, and a customer of the defendant water company furnishing the village with its supply of water, seeks in this action a permanent injunction restraining the company from enforcing collection of a water rate in excess of the amount fixed by the existing contract with the village. * * * In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. * * * In the case before us the municipality sought to protect its inhabitants, who were at the time of the execution of the contract consumers of water, and those who might thereafter become such, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of opinion that the complaint states a good cause of action."

The principle announced by this case is sustained and extended to cover the question of the size of water mains to which the customer is entitled in the case of *Alabama Water Co. v. Jasper*, 211 Ala. 280, 100 So. 486, where the court said: "In other words, while it may be easier and a little cheaper to connect the present main at one end with a four-inch main or pipe, the proof shows—that is, the weight of evidence—that it is feasible to make a six-inch connection at a cost not exceeding \$150, and thereby comply with the terms of the contract, which will prove a material benefit to the property owners along said main, especially in case of fire. * * * But he has a particular and direct interest in the main in question, different from the general public,

and can maintain an appropriate action to compel the company to perform a duty owing him under its franchise."⁸

§ 261. **Regulations inconsistent with franchise invalid.**⁹—That the rights as defined in the franchise can not be modified by the by-laws of the public service corporation, and that so far as such by-laws are inconsistent with the provisions of the franchise they will be held void and of no effect is well expressed in the decision of the case of *Bourke v. Olcott Water Co.*, 84 Vt. 121, 78 Atl. 715, 33 L. R. A. (N. S.) 1015, decided in 1911, where the right of the tenant to contract in his own name for the service was upheld in the face of a rule of the company providing that all bills for its service must be paid by the owner of the premises, for as the court said: "By section 13 of the company's charter it is provided that 'every person' living within the territorial limits of the village of Wilder 'shall be entitled to have and use an ample supply of water from the mains of said company, by paying a reasonable compensation therefor.'"

* * * It is insisted on the part of the orators, however, that this rule is not only unreasonable, but repugnant to the charter provision just quoted. We need not stop to consider whether the rule is reasonable or otherwise, for we deem it to be in manifest conflict with this provision of the charter, and it follows that it can not be enforced. The comprehensive language used plainly indicates an intention on the part of the legislature to require the company to supply all who called for water, provided they paid."

§ 262. **Liability in damages for failure to furnish adequate service.**—The public service corporation, in failing or refusing to furnish adequate service to a customer in accordance with the contract for such service and under the duty imposed in the franchise granting it the privilege to render the service, is liable in damages for an injury to such a customer resulting from such breach of contract or failure to perform such duties. In recognizing that a public service corporation occupying the streets of the municipality by virtue of a franchise granted for that purpose may not at its pleasure give or withdraw the service at its disposal which may be necessary for the comfort, health

⁸ *Robbins v. Bangor, R. & Elec. Co.*, 100 Maine 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504.

⁹ This section (§ 206 of 2d edition) cited in *Waldron v. International Water Co.*, 95 Vt. 135, 112 Atl. 219, 13 A. L. R. 340.

and even life of the inhabitants, but that it must render such service impartially, the court in the case of *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535, decided in 1897, held the public service corporation liable in damages for the death of a customer's children which resulted directly from its failure to supply the natural gas required to provide the necessary heat for his home, for as the court said: "The agreement so entered into did not in any manner absolve appellee from the duty assumed under its franchise, but rather, by its terms, fixed the character and scope of the duty so assumed. Even without and before the contract, it was the duty of the company to attach its mains to appellant's house pipe, on being requested to do so by him, and on his compliance with the reasonable conditions imposed by the company. Nor would it be enough to make such connections without also supplying the gas therefor.

* * * The failure of duty on the part of the company, as alleged in the complaint, is a tort, even though the complaint also shows a failure to comply with the contract. The contract was but a statement of the reasonable conditions under which the company was required to perform its duty. The authorities show that in such a case the action may be on contract or in tort, the necessary statement of facts being substantially the same in either case. The failure to perform such a contract is in itself a tort. The action in this case is therefore in tort."

While the consumer is entitled to recover actual damages for the failure of the public utility to furnish proper service, such damages do not include a decrease in the market value of the business but only for the loss of business, which was the only actual damage sustained, for as the court said in the case of *Louisville Gas & Electric Co. v. Mobley*, 205 Ky. 603, 266 S. W. 248: "Robert L. Mobley, who conducted a restaurant in the city of Louisville during the winter of 1917, brought this suit against the Louisville Gas & Electric Company to recover damages for its failure to furnish him natural gas for heating and cooking purposes in accordance with the terms of the franchise ordinance under which it was operating. * * * The main questions here involved were all considered in the recent case of *Louisville Gas & Electric Co. v. Sherman*, 202 Ky. 648, 261 S. W. 1, and for the reasons therein stated a new trial will have to be granted. In its instructions the court not only authorized the jury to find for loss of profits, but also for the diminution in the fair market value of plaintiff's business. It is true that the jury found no damages on account of the diminution

in the market value of the business, but, in view of another trial, we deem it proper to say that no damages on that account should have been authorized by the instructions. The particular damage was asked on the ground that plaintiff was forced by the shortage of gas to sell his business at a loss. As a matter of fact the supply of gas was adequate when the business was sold, and the evidence was insufficient to show either that plaintiff was forced to sell by the shortage of gas or that he would have received a higher price for the business if there had been no shortage. Not only so, but the damages were too speculative, remote, and uncertain to be allowed."

That the individual consumer about to be damaged in his business by a threatened discontinuance in service is entitled to injunctive relief is decided in the case of *Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895: "Should the defendant be permitted to carry out its threat of cutting off the supply of electrical energy, there would result great interference with plaintiff's business and damages difficult to estimate in an action at law. The case is therefore a proper one for equitable relief by injunction against coercion to yield to an illegal demand. * * * I am of the opinion that the plaintiff is entitled to an injunction to prevent damages from interference with its business and to prevent coercion to compel compliance with demands for a rate which is not established in accordance with the provisions of the Public Utilities Act, and that such injunction should continue until a new rate shall be established by act of the commission in accordance with the provisions of that act. Relief by injunction, however, should be granted only on condition of the performance by the plaintiff of its obligation to pay according to the terms of the contract."

§ 263. *Limitations.*—While the customer is entitled to service, the public utility may refuse to give it until payment is made and in so acting the company is not liable to penalties imposed for discrimination in service or a failure to serve. In sustaining the right of a telephone company to refuse service until payment was made for it according to reasonable rules and regulations the court in the case of *Southwestern Tel. & T. Co. v. Danaher*, 238 U. S. 482, 59 L. ed. 1419, 35 Sup. Ct. 886, Ann. Cas. 1916A, 1208, spoke as follows: "It uniformly is held that a regulation requiring payment in advance or a fair deposit to secure payment is reasonable, and this is recognized in the brief for the plaintiff where it is said that to protect themselves against loss telephone companies 'can demand payment in advance.' If they

may do this, it is difficult to perceive why the more lenient regulation in question was not reasonable. If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. * * * Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not, as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law."

Where written application for service is required together with payment for the same, until these conditions are complied with, there is no liability for failure to serve, although the consumer may be liable for his portion of the maintenance fund of an improvement district, maintained by all landowners, even though no service is requested or rendered, for as the court said in the case of *Phillips v. Cameron County Water Improvement Dist. No. 2* (Tex. Civ. App.), 5 S. W. (2d) 557: "It is provided by an act of the legislature enacted in 1923, which is made article 7751, Revised Statutes of 1925, that any person desiring water during the course of the year shall furnish the secretary of the board of directors of the water improvement district a statement in writing of the acreage intended to be put under irrigation by him, as well as the kind of crops to be planted, and at the same time such proportion of the water charge or assessment that may be prescribed by the board of directors. * * * No such statement was made by the appellant, and no payment made as provided by law. Appellant could not under the law escape the payment of his part of the maintenance fund by not demanding water, if the water improvement district was in a position to furnish water to him; and there is testimony to show that appellee was at all times prepared to furnish it, had the water been demanded, article 7752. * * * The corporation would be liable for damages for a failure to furnish water when demanded by

the landowner, and he had an adequate remedy at law to redress his wrongs, if any had been perpetrated on him."

After a municipality has disannexed territory from its limits, it may discontinue supplying water to the inhabitants of this territory, especially where it has no legal authority to serve beyond the limits of the city, as is indicated in the case of *Murray v. Waycross*, 171 Ga. 484, 156 S. E. 38, where the court said: "The petition of Mrs. W. N. Murray and others, citizens and residents and owning real estate in 'Deenwood,' a part of the city of Waycross, sought injunction to restrain the city, the individuals composing the commission of the city, and the city manager, their agents and employees, from cutting off the city water from the property of petitioners and from the fire plugs which make fire protection available to the property of petitioners; and to have the act approved July 24, 1929 (Laws 1929, p. 1450), reducing the corporate limits of Waycross, quoted in head-note 2 above declared to be unconstitutional and void. * * * The defendants answered, admitting that under authority of the act of July 24, 1929, they intended to cut from the corporate limits of the city the territory referred to in the petition and to discontinue supplying water thereto, because the city is without legal authority to furnish water beyond the limits of the city. * * * The case was submitted on the pleadings to the trial judge, who 'ordered that the relief prayed for be denied and the temporary restraining order dissolved.' * * * An act approved July 24, 1929 (Ga. Laws 1929, p. 1450), provided that, effective January 1, 1930, 'the corporate limits of said City of Waycross * * * are hereby reduced as follows.' * * * Incorporating a municipality or amending a municipal charter the general assembly may give such extent and boundaries to the incorporated territory as it may choose. Under the pleadings, which were submitted as evidence, the court did not err in refusing an interlocutory injunction."

CHAPTER 13

NO DISCRIMINATION IN SERVICE

Section	Section
270. Impartial service as measure of obligation.	283. Reasonable regulations for securing payment for service.
271. Municipal public utilities natural monopolies.	284. Discontinuing service for non-payment.
272. Requirement of uniform service takes place of competition.	285. Discrimination by rebates and free service.
273. Enforcement of rights by individual customer impracticable.	286. Exchange of service.
274. Public regulation and control of business of public nature.	287. Public service.
275. Discrimination based on reasonable classification.	288. Rates for service are not taxes and need not be uniform under constitution.
276. Individual may enforce uniform utility services.	289. Discrimination in favor of public or charitable purposes.
277. Wholesale service.	290. Inadequate supply no justification for discrimination.
278. Municipal public utility must serve public granting it franchise.	291. Rule necessary to protect poorer classes especially.
279. Uniform service to all of same or similar classes.	292. Suburban customer may be classified as such.
280. Municipality.	293. Quantity of service as basis of classification.
281. Contract for exclusive telephone service invalid.	294. Classification between old and new subscribers invalid.
282. Value of service to customer no valid basis for rate classification.	295. Nature of use of service not proper basis of classification.

§ 270. **Impartial service as measure of obligation.**—That there shall be no discrimination in the municipal public utility service furnished by the corporation enjoying the special privilege of rendering such service is a well-established principle, the rigid enforcement of which in practice is essentially necessary to secure adequate service for all, under reasonable terms and conditions, which belongs as of right to all the inhabitants of the municipality as well as to the municipality itself. Impartial service to all customers similarly situated is the measure and means of securing them in their franchise rights, which, as already shown, belong to the individual inhabitant of the municipality by virtue of the municipal public utility having accepted the

franchise, the obligation of which to the municipality and its inhabitants constitutes the consideration for the special privileges granted in the franchise to the corporation permitting it to furnish municipal public utility service.

§ 271. **Municipal public utilities natural monopolies.**—Because of the very nature of the service rendered, each customer can not provide it for himself nor purchase it independently of the others, nor from whom he pleases or with whom he might prefer to deal. The distribution of the municipal public utility service must necessarily be made from a single source, or at the most a very few sources. While a person desiring to purchase his fuel supply in the form of coal or wood may generally deal with any one of a number of independent concerns engaged in that line of business, the prospective customer, desiring heat or light in the form of gas or electricity or practically any municipal public utility service, including water, transportation, and communication, is limited in his purchase to a single market; and this must be so because of the nature of the manufacture and distribution as well as the extent of the investment necessary to provide any municipal public utility service. In other words, the furnishing of municipal public utility service is a natural monopoly which is never accompanied by competitive conditions in theory and seldom so in practice; because the extent of the investment necessary to provide such service is so great and the occupation of the streets in some cases is necessarily so exclusive that only a single source of supply is available, and this from the economic point of view should always be the case. The regulation and control now provided by state commissions takes the place of competition and saves the expense of unnecessary duplicated service.

§ 272. **Requirement of uniform service takes place of competition.**—Since, therefore, there is generally no control from the force of competition as all customers are obliged to secure their supply from a common source, and the necessary control is provided by state commissions, the regulation and control which experience has shown is always necessary to secure, uniformly, adequate service on reasonable conditions require the strict enforcement of the rule prohibiting discrimination between customers similarly situated in the common interest of all parties concerned, including the corporation providing the service itself. For it is apparent that any special concession which the corporation makes necessarily reduces its revenue to that extent,

which loss must either be borne by the company itself or by other customers in receiving less satisfactory service or service on less favorable terms.

§ 273. **Enforcement of rights by individual customer impracticable.**—While the authorities, to be noted and discussed, establishing this principle and defining what constitutes illegal discrimination and in what cases discrimination is permitted because conditions are different, hold that the individual customer may enforce this right in cases of discrimination against him, it is apparent that the expense and effort necessary to secure his rights in this way in many cases are prohibitive and in others the delay, pending the enforcement of the right by legal action, necessarily causes great inconvenience. Experience has accordingly demonstrated the desirability of the public securing these rights to the individual customer and itself through administrative action by the state or the municipal authorities or by state commissions created by the state for that purpose, all of which will be discussed at length later.

§ 274. **Public regulation and control of business of public nature.**—The rule prohibiting discrimination in service which was originally recognized and enforced by the common law, and now universally by statutory enactments, provides that persons, either natural or corporate, who are engaged in conducting a business which is public in its character or impressed with a public interest, or which is monopolistic in its nature, can not arbitrarily select their patrons or distinguish in the service they render them; but that they must serve impartially and on equal terms and conditions all persons without discrimination. The duty of the public service corporation toward the customer and that of the customer toward the corporation is reciprocal, and the rules and regulations defining their respective rights and obligations must be reasonable and just to both parties; and the service must be rendered without discrimination or partiality.¹

§ 275. **Discrimination based on reasonable classification.**²—Where the location of the prospective customer is unusual and the conditions of furnishing him service are peculiar because of the distance he is removed from the center or thickly populated district of the municipality or because of the sparsely settled con-

¹ *Stuver v. East Ohio Gas Co.*, 13 Ohio App. 276, 21 O. C. A. 554.

² This section (§ 213 of 2d edi-

tion) cited in *Arkansas Nat. Gas Co. v. Norton Co.*, 165 Ark. 172, 263 S. W. 775.

dition of his own neighborhood, it is only reasonable that the public service corporation, providing him with its service, be permitted to impose other and different conditions from those applicable to a customer centrally located in the thickly populated district of the municipality. There can be no absolute right to be supplied with the conveniences of municipal public utilities, for service furnished is necessarily limited to the ordinary uses for which it is adopted and to the locality where it is offered. And while the public service corporation can not act arbitrarily or discriminate among its customers, present or prospective, where similarly situated, by way of favoring one customer of a class or one class over others, a distinction may be made between different customers or classes of customers on account of location, amount of consumption, or such other material conditions which distinguish them from each other or from other classes. The extension of the service with the growth of the municipality and as a means of encouraging its growth, however, is a matter of special importance and peculiar interest to the public which should be, and usually is, expressly provided for in the franchise.³

³ United States. State of New York v. McCall, 245 U. S. 345, 62 L. ed. 337, 38 Sup. Ct. 122; Hollis v. Kutz, 255 U. S. 452, 65 L. ed. 727, 41 Sup. Ct. 371, P. U. R. 1921C, 637; State of Pennsylvania v. State of West Virginia, 262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. 658, 32 A. L. R. 300, affd. in 263 U. S. 350, 67 L. ed. 1144, 44 Sup. Ct. 123; United States v. Hubbard, 266 U. S. 474, 69 L. ed. 389, 45 Sup. Ct. 160; People of New York v. Public Service Comm., 269 U. S. 244, 70 L. ed. 255, 46 Sup. Ct. 83; United Fuel Gas Co. v. Railroad Comm. of Kentucky, 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150, P. U. R. 1929A, 433.

Federal. State of Missouri v. Bell Tel. Co., 23 Fed. 539; Postal Cable Tel. Co. v. Cumberland Tel. & T. Co., 177 Fed. 726; Homestead Co. v. Des Moines Elec. Co., 248 Fed. 439, 12 A. L. R. 390; Chicago Great Western R. Co. v. Postal Tel.-Cable Co., 249 Fed. 664, affd. in 248 U. S. 471, 63 L. ed. 365, 39 Sup. Ct. 162; North Carolina Public Service Co. v. Southern Power Co., 282 Fed. 837, P. U. R. 1923A, 289, 33 A. L. R. 626, cert. dis. in 263 U. S. 508, 58 L. ed.

413, 44 Sup. Ct. 164; Schappi Bus Line v. Hammond, 11 Fed. (2d) 940; Peoples Transit Co. v. Henshaw, 20 Fed. (2d) 87; Adams v. Decoto, 21 Fed. (2d) 221, P. U. R. 1927E, 714; United States Light & C. Corp. v. Niagara Falls Gas & C. Co., 23 Fed. (2d) 719, P. U. R. 1927E, 749, P. U. R. 1931B, 127; Queens Borough Gas & C. Co. v. Prendergast, 31 Fed. (2d) 339, P. U. R. 1928E, 791.

Alabama. Mobile v. Bienville Water Supply Co., 120 Ala. 379, 30 So. 445; State v. Birmingham Water Works Co., 164 Ala. 586, 51 So. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. 69, 20 Ann. Cas. 951; Montgomery Light & C. Co. v. Watts, 165 Ala. 370, 51 So. 725, 26 L. R. A. (N. S.) 1109, 138 Am. St. 71; Montgomery v. Greene, 180 Ala. 322, 60 So. 900; Cloverdale Homes v. Cloverdale, 182 Ala. 419, 62 So. 712, 47 L. R. A. (N. S.) 607; Montgomery v. Greene, 187 Ala. 196, 65 So. 783; Birmingham Water Works Co. v. Brown, 191 Ala. 457, 67 So. 613, L. R. A. 1915D, 1086; City Cleaning Co. v. Birmingham Water Works Co., 204 Ala. 51, 85 So. 291; Montgomery v. Smith, 205 Ala. 557, 88 So. 671, P. U. R. 1921E,

65; State v. Commander, 211 Ala. 230, 100 So. 223; Alabama Water Co. v. Knowles, 220 Ala. 61, 124 So. 96, P. U. R. 1930B, 193; Birmingham v. Birmingham Water Works Co. (Ala.), 42 So. 10.

Arkansas. Yancey v. Batesville Tel. Co., 81 Ark. 486, 99 S. W. 679; Danaher v. Southwestern Tel. & T. Co., 94 Ark. 533, 127 S. W. 963, 30 L. R. A. (N. S.) 1027; Montgomery v. Southwest Arkansas Tel. Co., 110 Ark. 480, 161 S. W. 1060; Clear Creek Oil &c. Co. v. Ft. Smith Spelter Co., 148 Ark. 260, 230 S. W. 897, P. U. R. 1922B, 597; Ft. Smith Light & Trac. Co. v. Bourland, 160 Ark. 1, 254 S. W. 481, *affd.* in 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249, rehearing denied and opinion amended in 268 U. S. 676, 69 L. ed. 631, 45 Sup. Ct. 511; Arkansas Nat. Gas Co. v. Norton Co., 165 Ark. 172, 263 S. W. 775; Arkansas-Missouri Power Co. v. Brown, 176 Ark. 774, 4 S. W. (2d) 15, P. U. R. 1928D, 6; Cherokee Public Service Co. v. West Helena (Ark.), 41 S. W. (2d) 773.

California. Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997; Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 146 Pac. 640, Ann. Cas. 1916D, 277, P. U. R. 1915B, 331; Limoneria Co. v. Railroad Commission, 174 Cal. 232, 162 Pac. 1033, P. U. R. 1917D, 183; Butte County Water Users Assn. v. Railroad Commission, 185 Cal. 218, 196 Pac. 265, P. U. R. 1921D, 479, 482, 485, 1921E, 595; Live Oak Waters Users Assn. v. Railroad Commission, 192 Cal. 132, 219 Pac. 65, P. U. R. 1924B, 790; Sierra & S. F. Power Co. v. Universal Elec. &c. Co., 197 Cal. 376, 241 Pac. 76; Sutter Butte Canal Co. v. Railroad Commission, 202 Cal. 179, 259 Pac. 937, P. U. R. 1928A, 811, *affd.* in 279 U. S. 125, 73 L. ed. 637, 49 Sup. Ct. 325; Thompson v. San Francisco Gas &c. Co., 18 Cal. App. 30, 121 Pac. 937; Nourse v. Los Angeles, 25 Cal. App. 384, 143 Pac. 801; Newell v. Redondo Water Co., 55 Cal. App. 86, 202 Pac. 914; Coast Counties Real Estate &c. Co. v. Monterey County Water

Works, 96 Cal. App. 267, 274 Pac. 415.

Colorado. Seaton Mountain Elec. Light, Heat &c. Co. v. Idaho Springs Inv. Co., 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078.

Connecticut. Gallaheer v. Southern New England Tel. Co., 99 Conn. 282, 121 Atl. 686, P. U. R. 1924A, 279; Bilton Machine Tool Co. v. United Illuminating Co., 110 Conn. 417, 148 Atl. 337; Levitt v. Public Utilities Comm. (Conn.), 159 Atl. 878.

Florida. Wilson v. Tallahassee Water Works Co., 47 Fla. 351, 36 So. 63; State v. Peninsular Tel. Co., 73 Fla. 913, 75 So. 201, 10 A. L. R. 501; Sanders v. Daytona Beach, 95 Fla. 279, 116 So. 23.

Georgia. Murray v. Waycross, 171 Ga. 484, 156 S. E. 38; Georgia Public Service Comm. v. Georgia Power Co., 172 Ga. 31, 157 S. E. 98, P. U. R. 1931B, 225.

Idaho. Hatch v. Consumers Co., 17 Idaho 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263.

Illinois. Wagner v. Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Danville v. Danville Water Co., 180 Ill. 235, 54 N. E. 224; Snell v. Clinton Elec. Light, Heat &c. Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. 341; Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N. E. 418.

Indiana. Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114; Central Union Tel. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64; State v. Portland Nat. Gas &c. Co., 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. 314; Richmond Nat. Gas Co. v. Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744; State v. Consumers Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; Indiana Nat. &c. Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761; Irvin v. Rushville Co-Operative Tel. Co., 161 Ind. 524, 69 N. E. 258; Indiana Nat. &c. Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868; Logansport &c. Gas Co. v. Ott, 30 Ind. App. 93, 65

N. E. 549; Mooreland Rural Tel. Co. v. Mouch, 48 Ind. App. 521, 96 N. E. 193; Van Ausdall v. Indiana Bell Tel. Co., 84 Ind. App. 257, 151 N. E. 19, P. U. R. 1927A, 389.

Iowa. Huffman v. Marcy Mut. Tel. Co., 143 Iowa 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010; Knotts v. Nollen, 206 Iowa 261, 218 N. W. 563.

Kansas. Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 400; Kimble v. Independence Gas Co., 108 Kans. 697, 196 Pac. 1063; Wichita R. & Light Co. v. Court of Industrial Relations, 113 Kans. 217, 214 Pac. 797, P. U. R. 1923D, 593; Landon v. Atchison, T. & C. R. Co., 113 Kans. 628, 216 Pac. 309, P. U. R. 1923E, 507.

Kentucky. United Fuel & C. Co. v. Commonwealth, 159 Ky. 34, 166 S. W. 783; Barriger v. Louisville Gas & C. Co., 196 Ky. 268, 244 S. W. 690, 31 A. L. R. 1408, P. U. R. 1923B, 96; Louisville Gas & C. Co. v. Sherman, 202 Ky. 648, 261 S. W. 1; Louisville Gas & C. Co. v. Mobley, 205 Ky. 603, 266 S. W. 248; Campbellsville v. Taylor County Tel. Co., 229 Ky. 843, 18 S. W. (2d) 305, P. U. R. 1929D, 547; Smith v. Kentucky Utilities Co., 233 Ky. 68, 24 S. W. (2d) 928; Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S. W. (2d) 356.

Louisiana. Glover v. Southern Distributing Co. (La. App.), 142 So. 289.

Maine. Lawrence v. Richards, 111 Maine 95, 88 Atl. 92, 47 L. R. A. (N. S.) 654; Belfast v. Belfast Water Co., 115 Maine 234, 98 Atl. 738, L. R. A. 1917B, 908; North Berwick v. North Berwick Water Co., 125 Maine 446, 134 Atl. 569; Kennebunk, Kennebunkport & C. Dist. v. Wells, 128 Maine 256, 147 Atl. 188, P. U. R. 1930A, 173.

Maryland. Public Service Comm. v. Brooklyn & C. B. Light & C. Co., 122 Md. 612, 90 Atl. 89; Merryman v. Baltimore City, 153 Md. 419, 138 Atl. 324, P. U. R. 1928B, 546.

Massachusetts. Souther v. Gloucester, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309.

Michigan. Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; Preston v. Board of Water Comrs., 117 Mich. 589, 76 N. W. 92; Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197; Bradford v. Citizens Tel. Co., 161 Mich. 385, 126 N. W. 444, 137 Am. St. 513; Ten Broek v. Miller, 240 Mich. 667, 216 N. W. 385, P. U. R. 1928B, 369.

Minnesota. Powell v. Duluth, 92 Minn. 53, 97 N. W. 450; Gordon v. Doran, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049; State v. Board of Water & C. Comrs., 105 Minn. 472, 117 N. W. 827, 127 Am. St. 581; State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19; State v. St. Paul City R. Co., 122 Minn. 163, 142 N. W. 136; State v. Waseca, 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 437; Guth v. Staples, 183 Minn. 552, 237 N. W. 411.

Mississippi. Caston v. Hutson, 139 Miss. 890, 104 So. 698; Southern R. & Light Co. v. Beekman, 157 Miss. 346, 128 So. 71.

Missouri. St. Louis Brewing Assn. v. St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; State v. Public Service Comm., 327 Mo. 93, 34 S. W. (2d) 37, P. U. R. 1931B, 376; State v. Public Service Comm., 327 Mo. 318, 36 S. W. (2d) 947, P. U. R. 1931C, 463; State v. Public Service Comm. (Mo.), 42 S. W. (2d) 349; Vandenberg v. Kansas City, Mo., Gas Co., 126 Mo. App. 600, 105 S. W. 17.

Nebraska. State v. Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; American Water Works Co. v. State, 46 Nebr. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. 610; Nebraska Tel. Co. v. State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; Keystone Inv. Co. v. Metropolitan Utilities Dist., 113 Nebr. 132, 202 N. W. 416.

New Jersey. Washington v. Washington Water Co., 70 N. J. Eq. 254, 62 Atl. 390; Bayonne v. Passaic Consol. Water Co., 98 N. J. Eq. 174, 130 Atl. 530; Federal Shipbuilding & Drydock Co. v. Bayonne, 102 N. J.

Eq. 475, 141 Atl. 455; Public Service Elec. Co. v. Board of Public Utility Comrs., 87 N. J. L. 128, 93 Atl. 707, P. U. R. 1915C, 229, affd. in 88 N. J. L. 603, 96 Atl. 1013; Hackensack Water Co. v. Tenafly, 95 N. J. L. 25, 111 Atl. 261, P. U. R. 1921A, 186; Hackensack Water Co. v. Board of Public Utility Comrs., 95 N. J. L. 295, 112 Atl. 595, P. U. R. 1921C, 407; Sixty-Seven South Munn v. Board of Public Utility Comrs., 106 N. J. L. 45, 147 Atl. 735, P. U. R. 1929E, 616.

New Mexico. McRae v. Water Supply Co., 19 N. Mex. 65, 140 Pac. 1065.

New York. Silkman v. Board of Water Comrs., 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827; New York Tel. Co. v. Siegel-Cooper Co., 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560; Postal Tel.-Cable Co. v. Associated Press, 228 N. Y. 370, 127 N. E. 256, P. U. R. 1920E, 1; Wright v. Glen Tel. Co., 112 App. Div. 745, 95 N. Y. S. 101; Armour Packing Co. v. Edison Elec. Illuminating Co., 115 App. Div. 51, 100 N. Y. S. 605; Graver v. Edison Elec. Illuminating Co., 126 App. Div. 371, 110 N. Y. S. 603; People v. Barrows, 140 App. Div. 24, 124 N. Y. S. 270; People v. Public Service Comm. 157 App. Div. 156, 141 N. Y. S. 1018; People v. Public Service Comm., 163 App. Div. 705, 148 N. Y. S. 583; Public Service Comm. v. Iroquois Nat. Gas Co., 189 App. Div. 545, 179 N. Y. S. 230, P. U. R. 1920B, 888; People v. Albion Water Works Co., 66 Misc. 651, 121 N. Y. S. 660.

North Carolina. Griffin v. Goldsboro Water Co., 122 N. Car. 206, 30 S. E. 319, 41 L. R. A. 240; Clinton-Dunn Tel. Co. v. Carolina Tel. & T. Co., 159 N. Car. 9, 74 S. E. 636; Woodley v. Carolina Tel. & T. Co., 163 N. Car. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; North Carolina Public Service Co. v. Southern Power Co., 179 N. Car. 18, 101 S. E. 593, 12 A. L. R. 304, P. U. R. 1920C, 688; North Carolina Public Service Co. v. Southern Power Co., 179 N. Car. 330, 102 S. E. 625, 12 A. L. R. 324, P. U. R. 1920D, 560 (sub nom.

Salisbury & Spencer R. Co. v. Southern Power Co.); Salisbury & Spencer R. Co. v. Southern Power Co., 180 N. Car. 422, 105 S. E. 28, P. U. R. 1921B, 774.

North Dakota. Great Northern R. Co. v. Cheyenne Tel. Co., 27 N. Dak. 256, 145 N. W. 1062.

Ohio. Cincinnati, H. & C. R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 216, 92 N. E. 233, 31 L. R. A. (N. S.) 301, 19 Ann. Cas. 842; Butler v. Karb, 96 Ohio St. 472, 117 N. E. 953; Cleveland & Eastern Trac. Co. v. Public Utilities Comm., 106 Ohio St. 210, 140 N. E. 139, P. U. R. 1923D, 853; Board of Education v. Columbus, 118 Ohio St. 295, 160 N. E. 902; Western Reserve Steel Co. v. Cuyahoga Heights, 118 Ohio St. 544, 161 N. E. 920.

Oklahoma. Hine v. Wadlington, 33 Okla. 173, 124 Pac. 299; Pioneer Tel. & T. Co. v. State, 45 Okla. 31, 144 Pac. 1060; Guthrie Gas, Light & Co. v. Board of Education, 64 Okla. 157, 166 Pac. 128, P. U. R. 1917E, 200, L. R. A. 1918D, 900; Fretz v. Edmond, 66 Okla. 262, 168 Pac. 800, L. R. A. 1918C, 405, P. U. R. 1918D, 381, P. U. R. 1918E, 466; Oklahoma Nat. Gas Co. v. Corporation Commission, 88 Okla. 51, 211 Pac. 401, 31 A. L. R. 330, P. U. R. 1923B, 836; Shaffer Oil & Co. v. Creek County Gas Co., 114 Okla. 258, 246 Pac. 630, P. U. R. 1926E, 289; Oklahoma Gas & Co. v. Wilson, 146 Okla. 272, 288 Pac. 316.

Oregon. Haugen v. Albina Light & Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424.

Pennsylvania. Allegheny County Light Co. v. Shadyside Elec. Light Co., 37 Pa. Super. Ct. 79; Bailey v. Fayette Gas-Fuel Co., 193 Pa. 175, 44 Atl. 251; Clairton Steel Co. v. Manufacturers Light & Co., 240 Pa. 427, 87 Atl. 998; Mechanicsburg Borough v. Mechanicsburg Gas & Co., 246 Pa. 232, 92 Atl. 142; Barnes Laundry Co. v. Pittsburgh, 265 Pa. 24, 109 Atl. 535, P. U. R. 1920D, 569; Youngman v. Commissioners of Waterworks, 267 Pa. 490, 110 Atl.

A municipality may classify its electric service as domestic and for other uses and make a different charge for the different services on account of the cost of rendering the service or of distributing it to the customer. Such is the effect of the decision

174; *Duquesne Light Co. v. Public Service Comm.*, 273 Pa. 287, 117 Atl. 63, P. U. R. 1922E, 286; *Consolidated Ice Co. v. Pittsburgh*, 274 Pa. 558, 118 Atl. 544, P. U. R. 1923E, 275, 277, 507, 508; *Peoples Nat. Gas Co. v. Public Service Comm.*, 279 Pa. 252, 123 Atl. 799, P. U. R. 1924D, 507; *Pittsburgh & Allegheny Tel. Co. v. Stinson Printing Co.*, 279 Pa. 314, 123 Atl. 818; *Westerhoff Bros. Co. v. Ephrata*, 283 Pa. 71, 128 Atl. 656; *Reigle v. Smith*, 287 Pa. 30, 134 Atl. 380; *American Aniline Products, Inc. v. Lock Haven*, 288 Pa. 420, 135 Atl. 726, 50 A. L. R. 121, P. U. R. 1927D, 112; *Scranton-Spring Brook Water Service Co. v. Public Service Comm. (Pa.)*, 160 Atl. 230.

South Carolina. *State v. Citizens Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. 870; *Paris Mountain Water Co. v. Camperdown Mills*, 98 S. Car. 304, 82 S. E. 417.

South Dakota. *Southwest Branch of Rural Reciprocal Tel. Co. v. Dakota Central Tel. Co.*, 53 S. Dak. 121, 220 N. W. 475.

Texas. *Memphis v. Browder (Tex.)*, 174 S. W. 982; *Allen v. Park Place Water, Light & Co. (Tex.)*, 266 S. W. 219; *Ft. Worth v. First Baptist Church (Tex.)*, 268 S. W. 1016; *Chapman v. American Rio Grande Land & Co. (Tex.)*, 271 S. W. 392; *Edinburg Irr. Co. v. Ledbetter (Tex.)*, 286 S. W. 185; *Community Nat. Gas Co. v. Natural Gas & Co. (Tex.)*, 34 S. W. (2d) 900, P. U. R. 1931C, 186; *Southwestern Tel. & T. Co. v. Luckett*, 60 Tex. Civ. App. 117, 127 S. W. 856; *Cock v. Marshall Gas Co. (Tex. Civ. App.)*, 226 S. W. 464; *Highland Park v. Guthrie (Tex. Civ. App.)*, 269 S. W. 193; *Markham Irr. Co. v. Brown (Tex. Com. App.)*, 292 S. W. 863.

Utah. *United States Smelting, Refining & Co. v. Utah Power & Co.*, 58 Utah 168, 197 Pac. 902, P. U. R. 1921B, 837; *Utah Copper Co. v. Public Utilities Comm.*, 59 Utah 191, 203 Pac. 627, P. U. R. 1922E, 376; *St. George v. Public Utilities Comm.*, 62 Utah 452, 220 Pac. 720, P. U. R. 1924B, 550.

Virginia. *Exchange & Bldg. Co. v. Roanoke Gas & Co.*, 90 Va. 83, 17 S. E. 789.

Washington. *State v. Mountain Spring Co.*, 56 Wash. 176, 105 Pac. 243, 34 L. R. A. (N. S.) 196; *State v. Metaline Falls Light & Co.*, 80 Wash. 652, 141 Pac. 1142; *State v. Public Service Comm.*, 83 Wash. 130, 145 Pac. 215; *State v. Public Service Comm.*, 107 Wash. 17, 180 Pac. 913; *Monroe Water Co. v. Monroe*, 135 Wash. 355, 237 Pac. 996; *State v. Department of Public Works*, 158 Wash. 462, 291 Pac. 346, P. U. R. 1931B, 184.

West Virginia. *United Fuel Gas Co. v. Public Service Comm.*, 73 W. Va. 571, 80 S. E. 931; *Wingrove v. Public Service Comm.*, 74 W. Va. 190, 81 S. E. 734, L. R. A. 1918A, 210; *Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 82 S. E. 345; *Elk Hotel Co. v. United Fuel Gas Co.*, 75 W. Va. 200, 83 S. E. 922, L. R. A. 1917E, 970; *Clarksburg Light & Co. v. Public Service Comm.*, 84 W. Va. 638, 100 S. E. 551, P. U. R. 1920A, 639; *Charleston v. Public Service Comm.*, 86 W. Va. 536, 103 S. E. 673, P. U. R. 1920F, 823; *United Fuel Gas Co. v. Public Service Comm.*, 95 W. Va. 415, 121 S. E. 281, P. U. R. 1924C, 280; *Huntington Development & Co. v. Public Service Comm.*, 105 W. Va. 629, 143 S. E. 357, P. U. R. 1929A, 168.

Wisconsin. *Kilbourn v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499; *Willow River Power Co. v. Railroad Commission*, 197 Wis. 1, 220 N. W. 173.

in the case of *Kiefer v. Idaho Falls*, 49 Idaho 458, 289 Pac. 81, where the court said: "We believe it clear that, since municipally owned utilities are not under the jurisdiction of the public utilities commission (C. S., section 2371), actions may be instituted in the courts by any person interested and affected thereby to test the reasonableness of their rates. * * * Unless the rates complained of resulted in such discrimination as against the domestic lighting rate as to make it bear more than its just and reasonable share of the burden of maintaining, operating, and continuing the city's power plant, or unless the rates complained of as a whole were insufficient to raise enough revenue to adequately continue, maintain, and operate the plant without imposing a tax upon appellants and their property, conceding that the municipal power plant should be self-sustaining, the appellants are not entitled to question the rates. * * * Rates fixed by a municipality for electricity furnished by its own plant are presumed to be reasonable, and the burden is upon those attacking such rates to show that such rates are discriminatory or unreasonable. * * * Mere difference in the rates charged various classes of users is not sufficient to establish an unjustifiable discrimination. * * * This court can not substitute its judgment for the judgment of the city council as to what rates are reasonable or best promote the public interest, unless some substantial right is adversely affected. *Idaho Power Co. v. Thompson* (D. C.), 19 Fed. (2d) 547; *Detroit, etc. v. Michigan Railroad Commission* (D. C.), 203 Fed. 864. While ordinarily a rate should be sufficient to pay its cost of production, there may be circumstances which would justify a less rate. * * * Of course, the courts may not fix a rate; they may only determine whether a rate already established is discriminatory or unreasonable. * * * Hence it would seem that even in these classes the rate is approximately equal to the cost of production. There is, therefore, no basis for plaintiffs' contention that these classes of users are being benefited at the expense of those who use current for domestic lighting. (Pond on Public Utilities, sections 275, 565). As said in *Western Union v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 564, 45 L. ed. 765: 'There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must

have some reasonable relation to the amount of difference, and can not be so great as to produce an unjust discrimination.' ”

§ 276. **Individual may enforce uniform utility services.**— In sustaining an action of mandamus brought by an inhabitant to secure telephone service at the rate fixed by the statute, the court in the case of *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114, decided in 1889, expressed this principle in the following language: “It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. * * * Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities and services to business houses, persons and companies, and discriminating against any person or company, can be compelled by mandate on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others.”

While uniform charges are required for the same class of telephone service, a different classification and charge may be made to cover automatic service, based on the cost and value of the service. This principle is clearly established in the case of *State v. Public Service Comm. (Mo.)*, 36 S. W. (2d) 947, P. U. R. 1931E, 463, where the court said: “Under the automatic or dial system the user of a P. B. X. telephone, unless it is equipped with a dial, must have the local switchboard operator dial for him from her switchboard. If he has a dial telephone he can make his own call from his telephone or station. Under the manual system if the P. B. X. switchboard was unattended, as at night where local operators were kept only during the day, a line could be left ‘plugged through’ to the company’s central office so that the individual station could make a call as on an individual line. Under the automatic system a line can be similarly left ‘plugged through,’ but in order that a call may be made from the individual telephone thus left connected that telephone must have a dial. * * * On the first proposition appellant says it is conceded ‘that the extra dial equipment for which it is sought to charge an additional rate is necessary in order to give the same kind of service as was rendered heretofore under the manual system of operation,’ and argues that therefore no value is given for the added charge. The argument overlooks the fact, shown

by the company's undisputed evidence, that a part of the service formerly obtained by the subscriber, viz.: that which he could and often did obtain under the manual system and can not obtain without the dials under the automatic system, was an additional service not constituting nor intended by the company to constitute a part of the P. B. X. service, properly speaking, and not included in the rate charged for P. B. X. service; in short, a service for which the P. B. X. subscriber does not pay in the scheduled P. B. X. rate. That the subscriber may have been getting that additional service without charge under the manual system, because the company could not practicably make and enforce a charge for it, does not establish a right to continue doing so nor prove that such additional service is not in fact worth to the consumer what the company now charges for it. * * * The evidence showed that P. B. X. subscribers paid less per call than any other class of subscribers and that the rates for service in St. Louis yield a low return to the company. We think the commission could not properly have found under the evidence that the rate in controversy exceeds the value of the service. * * * The company owns its property and, subject to the regulatory power of the state exercised through the commission, may adopt such reasonable methods and regulations as it believes will be fairly and generally beneficial to it and all of its customers. * * * The rate in controversy having been approved by the commission, the burden rested upon complainant seeking to set it aside 'to show by clear and satisfactory evidence' that it is unreasonable or unlawful. * * * We think the evidence failed so to show and that the circuit court properly affirmed the order of the commission."

The rule requiring that all applying for service in the same class be served alike is well expressed in the case of *United Fuel Gas Co. v. Railroad Comm. of Kentucky*, 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150, P. U. R. 1929A, 433, where the court said: "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations."

§ 277. **Wholesale service.**—A public utility manufacturing and supplying electricity at wholesale over a large territory exclusively for resale and distribution through other utilities for

the consumption of their customers is subject to this principle denying the right of discrimination. While a public utility serving retail customers can not be forced to supply other competing utilities with energy at wholesale, when supplying wholesale service only it must serve all alike and may not discriminate, for as the court said in the case of *North Carolina Public Service Co. v. Southern Power Co.*, 179 N. Car. 330, 102 S. E. 625, P. U. R. 1920D, 560, 12 A. L. R. 324: "It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations, who stand in like case. It can not sell to one and arbitrarily refuse to sell to another. One corporation, desiring current from it for distribution purposes, *prima facie* has precisely the same right to obtain it as another. A public service corporation can not arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons. If the defendant, in the beginning, had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. But when defendant commenced and continued to sell its current to such small corporations for purposes of resale and distribution, every such corporation has an equal right, and it must not discriminate. That does not mean it must sell them all at the same price. The circumstances surrounding each distributing corporation, cost, etc., must be taken into consideration. Having undertaken this public service, the defendant is bound to serve impartially all who have the right to demand its service. As it does not undertake to furnish the individual consumer, and having elected to furnish corporations that do supply the individual, it must continue to furnish such corporations so far as its business and the capacity of its plants will permit. * * * The defendant does not undertake to furnish them electricity except through the medium of a distributing company. If defendant can not be compelled to so continue to furnish it, then these citizens have no other resource except to pay the higher cost of coal-made current, and the defendant is practically free from state control. Therefore, they have a direct public interest in imposing upon defendant the duty it voluntarily assumed ten years ago and has been discharging ever since."

Unless a public utility holds itself out as offering wholesale service, it can not be required to furnish such service to another utility for distribution to individual customers, because the effect of forcing it to do so would be to make it a party to the creation

and support of a competitor in the same line of service. This principle is clearly recognized in the case of *Sixty-Seven South Munn v. Board of Public Utility Comrs.*, 106 N. J. L. 45, 147 Atl. 735, P. U. R. 1929E, 616, where the court said: "But, if the disputed practice is applied generally (that is to say, if the utility uniformly and as a matter of policy declines to sell at wholesale to a retailer for redistribution and resale by the latter to the consumer at retail rates), we find nothing discriminatory in the practice. No prospective consumer is denied electric current; the question involves merely the matter and personnel of delivery. Neither does it seem to be an unreasonable or unlawful exercise of power on the part of the commission to refuse to direct the utility to sell under the circumstances. This view has in mind not merely the business of the utility, but also the public welfare. *Hunter v. Board of Public Utility Commissioners*, 141 Atl. 90, 1 N. J. Misc. 408. If the utility should be compelled to submit to this practice, it is conceivable that the meter company, or some like concern, could become a very real competitor. The meter company could take each square block as a unit of operation, and, by keeping its paraphernalia off the public streets, refrain from becoming a utility, keep out of the control of the board of public utility commissioners, take its power through a master meter somewhere in the square, and compete with the utility sale and delivery to the various users within the block. * * *

The board of public utility commissioners determined that the practice in question is not in the public interest. We consider that the board acted quite within its lawful discretion in so finding and in refusing to issue a compelling order against the utility."

Where the service is the same and it is given under substantially the same conditions, a different rate is not permitted because of a so-called manufacturers' rate, scheduled by the public service commission, and such a classification by the commission will not be sustained because it is discriminatory in effect. This principle is established in the case of *State v. Public Service Comm. (Mo.)*, 34 S. W. (2d) 37, P. U. R. 1931B, 376, where the court said: "The rule of liberal construction thus uniformly accorded by this court to the Public Service Commission Law is consonant with the universal rule applicable to similar remedial statutes, which is to the effect that 'laws enacted in the interest of the public welfare or convenience should be liberally construed, with a view to promote the object in the mind of the legislature, by suppressing the mischiefs and advancing the remedy.' 36

Cyc. 1173-1175. * * * We are of the opinion that the construction given to such so-called manufacturers' rate schedule by the public service commission is too narrow, and that such manufacturers' rate schedule should be given a liberal, rather than a strict, construction, bearing in mind that legislative enactments prescribing and fixing rates to be charged for public utilities, or which empower an administrative agency or commission of the legislature to prescribe and fix such rates being referable to the police power of the state, and being enacted in the interest of the public welfare or convenience, are highly remedial, and therefore are to be liberally construed so as to promote the object in the mind of the legislature. * * * The public duty must be discharged for the equal benefit of all, and obviously to permit discrimination or inequality in the service or charges is to ignore the public obligation. * * * It is undisputable under the evidence herein, as adduced at the hearing of the complaint before the public service commission, that there is no dissimilarity or difference in the service of furnishing and supplying water to the ten customers of the water company who enjoy the benefit of the rate schedule denominated 'Manufacturers' Rates' and the service of furnishing and supplying water to the complainants herein. * * * It therefore appears to our minds that the strict construction and application given to the manufacturers' rate schedule by the public service commission necessarily results in an unjust and unfair discrimination against the complainants herein, who are users of water under the same or substantially similar and contemporaneous service conditions as are applicable to those users of water enjoying the benefit of the manufacturers' rate schedule, in contravention of both the letter and the spirit of the Public Service Commission Law, which is merely declarative of the rule of the common law, bearing upon the subject of unjust discrimination in rates and service."

§ 278. **Municipal public utility must serve public granting it franchise.**—The case of *Hatch v. Consumers Co.*, 17 Idaho 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263, decided in 1909, furnished the following excellent statement of this rule: "In the first place, the defendant is a creature of the laws of this state created for a special purpose of a public character. It is not permitted like a private party to charge whatever it pleases or to serve those only whom it may choose to serve. It must, on the contrary, serve the inhabitants of the municipality from which it receives a franchise for a reasonable uniform compensation to

be established in conformity with law (section 2839, Rev. Codes), and it must serve all persons without distinction or discrimination who pay the rates established and comply with the reasonable rules and regulations of the company."

Exclusive service may not be made the basis of classification, and discrimination against a consumer taking service elsewhere is not permissible. This principle and the reason on which it is based are well expressed in the case of *People v. Public Service Comm.*, 163 App. Div. 705, 148 N. Y. S. 583: "In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service, but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electrical current. If the company can lawfully decline to furnish any current to this relator because he also proposes to obtain electricity from a neighbor (not a competing company), it can equally well refuse to furnish electrical current to a consumer who himself generates a part of the current which he uses. Such a limitation upon the company's obligation would, as it seems to us, be quite unreasonable. * * * In our opinion, however, the company's duty to furnish service does not rest upon the statute alone, but upon the common-law obligation as a public service corporation which requires it to serve impartially every member of the community. It may be that, if it did not undertake to furnish electricity for power purposes to any one, it could not be coerced to do so. Upon that question we express no opinion. It does, however, profess and undertake to furnish electric current for power purposes, and this it does by virtue of its franchise as a public service company. So professing and undertaking, it can not arbitrarily pick and choose whom it will serve and whom it will not."

Each kind of service must be furnished on its own merits and no discrimination is permitted against a customer for one service because he does not desire another service. This is clearly established by the case of *Seaton Mountain Electric Light, Heat &c. Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078: "Plaintiffs are required to take electric current for lighting purposes as a condition precedent to being furnished with steam for heat. This is simply coercion, and an attempt on the part of the defendants to compel the plaintiffs to purchase electric current which they may not want or need. If they can be permitted to do this, then they can also say to

plaintiffs: 'We will not furnish you with electric current unless you take steam.' It is their privilege to determine whether they desire one or both of the commodities which the Seaton Company manufactures and sells, and a condition which imposes an obligation to take both or neither is not only unreasonable, but capricious, arbitrary, oppressive, and discriminatory."

This principle is tersely stated in the case of North Carolina Public Service Co. v. Southern Power Co., 282 Fed. 837, 33 A. L. R. 626, P. U. R. 1923A, 289,⁴ as follows: "But, when a corporation has definitely undertaken and entered upon a particular service authorized by a charter which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority, and it must serve all alike. In such public service it can not pick and choose its customers."

§ 279. **Uniform service to all of same or similar classes.**—By way of defining the conditions which determine the class and fix the terms of service accordingly the case of State of Missouri v. Bell Tel. Co., 23 Fed. 539, decided in 1885, is an early decision prohibiting a telephone company from limiting its service to one telegraph company or to any particular line of business. In holding that, having established a telephone system, it must serve all classes of business including any telegraph company that applied for service in the same way and without discrimination, the court said: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, 'my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service."

The practical reason for refusing the public utility the right to discriminate among its customers of the same or similar classes, although it may treat different classes differently, is clearly shown in the case of Arkansas Natural Gas Co. v. Norton Co., 165 Ark. 172, 263 S. W. 775, where the court said: "Now

⁴ Certiorari dismissed in 263 U. S. 508, 68 L. ed. 413, 44 Sup. Ct. 164.

a corporation supplying natural gas to consumers can not be considered as a public utility with respect to certain classes of its consumers and as a private corporation with regard to certain others. The acceptance by the Arkansas Natural Gas Company of the franchise and privileges granted it carried with it the duty of supplying all persons and corporations along the lines of its main with natural gas without discrimination. All are entitled to have the same service on equal terms and at a uniform rate. The law will not tolerate a discrimination in the charges of public utility corporations. * * * In this connection it may be stated that, while public service corporations can not act arbitrarily, or discriminate among their consumers similarly situated by way of favoring one consumer or class of consumers over others, a distinction may be made between different consumers or classes of consumers on account of location, amount of consumption, or such other material conditions which distinguish them from each other or from other classes. *Yancey v. Batesville Telephone Co.*, 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135; *Southwestern Telegraph & Telephone Co. v. Sharp & White*, 118 Ark. 541, 177 S. W. 25, L. R. A. 1915E, 323; and *Pond on Public Utilities*, section 213, p. 262. * * * As we have already seen, under modern business conditions, public utilities are a necessity and have a practical monopoly in the fields occupied by them respectively in the business world. Their products must be accepted and used, not only for domestic convenience, but on account of business necessities. * * * They also have a right to establish rates which are equivalent to the service performed by them. Thus they acquire a great advantage over their business rivals, and are thereby enabled to furnish gas to consumers at a much cheaper rate and under much more favorable conditions. The manufacturer needing and using gas in his business must purchase it from the public service corporation, or his business competitors, who have such service, will have a great advantage over him. If a manufacturer or other business enterprise can not secure the service upon the same terms and under the same conditions as his rivals in business, he will suffer serious loss or damage to his business; and in some cases his business will be entirely destroyed. If the public service corporation is allowed to act in an arbitrary and discriminatory manner in performing its service to the public it can in all cases seriously injure any of its customers or destroy his business entirely."

Discrimination is not permitted in the rates charged for uniform service and an ordinance exacting a fee for the service in

addition to the rate charged for it is invalid, because it amounts to a discrimination between consumers of the same class, as is indicated in the case of *Highland Park v. Guthrie* (Tex. Civ. App.), 269 S. W. 193, where the court said: "It is that these two citizens must be dealt with equally and given the same service on equal terms, and that the charge for the service asked must be the same to both. * * * Under the terms of the ordinance the citizen residing in the Mt. Vernon addition is required to pay a fee of fifty dollars for this service that can not be exacted from the other citizen. This is unjust discrimination, unless there are such special circumstances existing in reference to one of the applicants that would warrant the placing of the applicants in a different class in respect to the charge for such service. * * * Does the fact that the town of Highland Park purchased the waterworks for less than its value and before the Mt. Vernon addition was annexed authorize the discrimination made by the ordinance? We do not think so. The item of an enhanced price paid for a lot because of water service, which constituted one of the elements of reducing the price asked and paid for the waterworks, did not give the owner of such a lot the right to have his premises connected with the water system. Such owner in this respect enjoyed no higher right than would have been his had he owned the lot before the water system was constructed. * * * There went with this purchase the duty to supply water impartially to all reasonably within reach of the pipes and mains of the water system, without discrimination between persons similarly situated. * * * This is clearly an unjust discrimination and violative of the rule of common law governing the administration of a municipal owned water system. It is also violative of article 772b of the 1911 Revised Statutes, which is the fundamental law of the municipality, and declares that rates charged for service furnished by municipal water system shall be equal and uniform."

By virtue of a legislative enactment, a municipality granted a franchise for the purpose of carrying white passengers only on certain streets of the city of Daytona Beach. In sustaining this franchise, under which negroes were refused transportation, the court failed to find any unreasonable discrimination or interference with the public in its use of the streets and held that the classification was made for the protection of the traveling public. This principle, upholding the right to make such a race classification, is established as follows in the case of *Sanders v. Daytona Beach*, 95 Fla. 279, 116 So. 23, where the court reasoned

as follows: "Pursuant to authority vested in it by the legislature of Florida, the city of Daytona Beach in November, 1927, granted a franchise to Daytona Beach Motor Lines, Inc., a Florida corporation, for the purpose of transporting white passengers only over certain streets of said city of Daytona Beach. * * * It is contended here that the franchise brought in question is an unjust and unreasonable discrimination between the white and negro races; that it imposes unreasonable restrictions on a lawful occupation or business; and that it deprives appellants of their property without due process of law. A franchise that would have the effect of diverting the streets of a municipality from a public to a private use or that would unreasonably hamper the public in the use of them would be ultra vires and void. 19 R. C. L. and cases cited. Careful examination of the record in this case fails to disclose such unreasonable discrimination or restrictions as appellants contend that the franchise imposes, and there is no showing whatever that it would in any way interfere with the public in the use of the streets of the city of Daytona Beach. It appears to have been authorized by the legislature and by the showing made was granted to safeguard and protect the traveling public."

While a common carrier for hire in the absence of statutory regulation may provide for the separation of its white and colored passengers so long as similar accommodations are afforded each, it may not discriminate on account of the race or color of its passengers in rendering its service under the rule as expressed in the case of *Brumfield v. Consolidated Coach Corp.*, 240 Ky. 1, 40 S. W. (2d) 356, where the court said: "The adoption and enforcement of such regulations are subject to the requirement that they must be reasonable. The reasonableness of such regulations is a question of law for the court and not for the jury, for the obvious reason that if this question should be left to the jury, on the trial, one jury might hold such rule was reasonable and another might hold the same rule or regulation was unreasonable. Thus, its uniformity and permanency, the essential qualities of every regulation, would be destroyed. * * * A ticket in this state is not a contract of carriage, but only a memorandum of the agreement. * * * And, in the absence of an express contract to the contrary, the passenger accepts the ticket subject to the custom and usages, rules and regulations of the carrier, which are uniform and permanent and are intended to protect and promote the comfort, convenience, safety, or health of all passengers alike, and at the same

time secure the rights of the carrier. A ticket entitles a passenger to transportation within a reasonable time, and not on any particular train or bus or other vehicle in use by the carrier.

* * * A common carrier can not receive and reject passengers at its pleasure. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; 2 Kent. 55; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470. If a carrier refuses to receive a passenger with a ticket, or qualified to purchase a ticket from it, without sufficient excuse, it will be liable to an action for damages. Story on Bailments 328; *Jeremiah on Carriers* 59, 2 Kent. 599. Another way of expressing it is, the law requires a carrier to receive and transport passengers without discrimination and with impartiality (*Winnegar's Adm'r. v. Central P. R. Co.*, 85 Ky. 547, 4 S. W. 237). * * * No rule, regulation, custom, or usage may be relied upon by a carrier, which will permit it to discriminate against or in favor of a passenger on account of his race or color. Such is intolerable and will not be countenanced by the courts. * * * The separate coach law of the state applies with like effect to both white and colored passengers using the railroads for travel. The legislature has not extended it to bus lines. * * * A common carrier of passengers for hire has the right, in the absence of a statute, to prescribe regulations for the separation of white and colored passengers, giving equal and like protection and accommodation to both."

While rates must be sufficient, they may differ for different classes of service and be graduated according to the cost of the service. This principle and the reason on which it is based are clearly indicated in the case of *Keystone Investment Co. v. Metropolitan Utilities Dist.*, 113 Nebr. 132, 202 N. W. 416, where the court said: "It must receive a sufficient revenue to cover the cost of the operation of the plant and necessary extensions and replacements, allowance for depreciation, together with a sufficient amount to pay the interest upon its bonded indebtedness and to raise a sinking fund to pay the bonds as they mature.

* * * This amounts to a demonstration that the charges generally received for fire protection are not exorbitant, but are, in fact, unreasonably low. * * * Plaintiffs further contend that there is a discrimination because a less charge is made for an automatic sprinkler service than for a standpipe service, where the connection is of the same size, but the evidence also shows that the automatic sprinkler service is more efficient in preventing a fire in the building where installed, and therefore makes less liable the burning and collapse of the building, with the con-

sequent breaking of the water pipes and loss of water occasioned thereby. The liability of defendant to loss of water through the breaking of pipes where a sprinkler system is installed is therefore less than where a standpipe system is installed, and appears to justify a lesser charge. After a careful reading and examination of the entire bill of exceptions, we are convinced that the evidence justifies each of the findings made by the trial court, to the effect that defendant renders to the plaintiffs a valuable service other and different from that furnished to the public at large, and that the charge made for such service is reasonable and is not discriminatory."

§ 280. **Municipality.**—The rule prohibiting discrimination in service or rates applies to the municipality equally with privately owned public utilities as is shown in the case of *Montgomery v. Greene*, 187 Ala. 196, 65 So. 783: "It is conceded that the former holding is sound if we were dealing with an ordinary water company undertaking to supply water for a profit, instead of with a municipality which had undertaken to supply its inhabitants with water. This point was so strongly urged upon the former appeal and upon the application for rehearing that we attempted to respond to same, and we again refer to the authorities quoted and cited in said response, which puts a municipality upon the identical footing with an ordinary company when undertaking to supply a monopoly. Indeed we have found no authority which warrants the distinction contended for, and find many that do not. If, however, the authorities authorized a distinction, we think the question is settled by the statute under which the city derives its rights and powers, and which contemplates that the rights and powers of the city over the extension should be the same as that given and exercised over the original system."

Discrimination in rates or service is not permitted by municipalities any more than private public utilities, and the requirements that a substantial sum be paid by a certain section of the municipality for the privilege of receiving service, which is not required of other customers or sections, violates the rule against discrimination, and is not permissible under the decision in the case of *Western Reserve Steel Co. v. Cuyahoga Heights*, 118 Ohio St. 544, 161 N. E. 920, where the court said: "But when a municipality, under the authority conferred upon it by the constitution, engages in the operation of a public utility, it enters that field burdened with the same duties and subject to the same restrictions, in respect to the public of the territory served, as would apply to and govern a private corporation similarly en-

gaged; and especially where it engages in such enterprise extra territorium is its relationship to the public shorn of sovereign prerogative. * * * The duty of the city of Cleveland to the public of the village of Cuyahoga Heights with reference to supplying it with water was the duty of a public service corporation dedicated to the service of such public. The duty of the village of Cuyahoga Heights to its own public was the duty of a government contracting for a public service, and, as such, to do so without discrimination in favor of or against any member of its public; and neither the city nor the village had the power, by contract with the other, to absolve itself from its duty.

* * * That it is a discrimination against the plaintiffs in error to require of them the payment to the village of \$4,546.80 for the privilege of thereafter buying water from the city, which payment is not required of any other member of its public, proclaims itself by the mere statement. * * * The exaction by the village that the city refrain from serving water to the plaintiffs in error until they have paid an indebtedness contracted by the Hunter Crucible Steel Company is an unreasonable and unlawful discrimination against them, and the insertion of such provision in the contract was a violation of the duty of the village to its public and was unlawful. Its enforcement against the plaintiffs in error is an unlawful discrimination against them."

While a municipal corporation may not discriminate in its charges any more than a private corporation, a classification for lighting and power is generally permitted because of the difference in cost of production, as well as the use made of the product. As the court said in the case of *Westerhoff Bros. Co. v. Ephrata*, 283 Pa. 71, 128 Atl. 656: "Municipal corporations, when operating public utilities, do not come within the Public Service Act of 1913 (Pa. St. 1920, sec. 18057 et seq.), but, in determining whether they discriminate in charges made, are to be placed in the same category as private corporations. *Barnes Laundry Co. v. Pittsburg*, 266 Pa. 24, 109 Atl. 535. Neither may, without reason, differentiate in the prices charged to the same class of customers. They must furnish impartially, and on equal terms, all who apply for service. *Robbins v. Bangor R. & E. Co.*, 100 Maine 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963. And where the cost of product supplied is uniform, the corporation selling it can not object to the use made of it by the consumers. *Baily v. Fayette Gas-Fuel Co.*, 193 Pa. 175, 44 Atl. 251. * * * The cost of maintaining the plant for lighting purposes largely used in certain hours of the day only, made necessary an additional

charge for such service. Such a classification as to rates has long been recognized as proper by the public service commissions of this and other states, but any extended reference to these rulings is deemed unnecessary here. * * * If anything is to be gathered from the record, it is that the classification made was reasonable, and the difference in charges for power and light based on cost of production. Complainant, by the ordinance, was bound to pay for the latter service at the same rate as were all other consumers, and could not evade its responsibility by a subterfuge, reducing the power voltage to that available for illumination."

A municipality is required to serve without discrimination, but may classify its service and graduate its rates according to the cost and nature of the service furnished; but after doing so, its schedule of rates, the same as a private corporation, must be filed with the public utilities commission. This principle is again established in the case of *Kennebunk, Kennebunkport & Wells Water Dist. v. Wells*, 128 Maine 256, 147 Atl. 188, P. U. R. 1930A, 173, where the court expressed the rule as follows: "Uniformity, as required by the act creating the district, therefore, must be held to mean that the rates established by the trustees must be reasonable and just, and without unjust discrimination between takers of the same class, having reference to the nature of the service and also the cost of supplying it. 40 Cyc. 802; 27 R. C. L. 1448-1451; *Souther v. Gloucester*, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309. * * * The rates of the water company, if adopted by the trustees, were no longer those of the water company, but became on adoption those established by the district, and according to the plain intent of chapter 55, Rev. St., must be filed with the utilities commission, in order that they may be of public record, and be complained against by any person aggrieved thereby. Until this is done, the courts will not enforce the recovery of them in a suit at law. A utility has no right to furnish service to the public until it has complied with the provisions of chapter 55. Failure to do so subjects it to a penalty."

This general principle prohibiting discrimination is perhaps best expressed by the United States Supreme Court in the case of *State of New York v. McCall*, 245 U. S. 345, 62 L. ed. 337, 38 Sup. Ct. 122, as follows: "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the de-

velopment of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents, and we agree with the court of appeals of New York in concluding that the action of the commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the commission as to the expediency or wisdom of the order, they are without authority to substitute for its judgment their views of what may be reasonable or wise."

§ 281. **Contract for exclusive telephone service invalid.**—The case of *State v. Citizens Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. 870, decided in 1901, with reference to this point, stated the general rule requiring the same service to be rendered to all members of any particular class; and in refusing to sustain the conditions upon which such service was to be rendered—that the customer would use that service to the exclusion of similar service offered by a competing public service corporation—the court said: "When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone system exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems."

§ 282. **Value of service to customer no valid basis for rate classification.**—Nor is there any justification for making a greater charge for municipal public utility service to a particular

customer on account of the greater value to him of such service or the greater profit that would probably accrue to him than to some other customer. The public service corporation is not permitted to discriminate against a competitor in its service because, having undertaken to render such service to the public generally, it can not refuse to serve all, even including its competitors, without discrimination, for as the court in the case of *Postal Cable Tel. Co. v. Cumberland Tel. & T. Co.*, 177 Fed. 726, decided in 1910, observed: "A telephone company, which is often described as a common carrier of news, is engaged in a quasi-public service, affected with a public interest, for which it is endowed with some of the sovereign powers of the state, and as such is held to the obligation of an impartial and undiscriminating service to the public upon common-law principles. * * * This common-law obligation of equal and undiscriminating service clearly requires that the same charges shall be made to all persons for the rendering of similar service. * * * It is clear that a greater charge is not justified against the telegraph company merely on account of the greater profit which it may receive from the telephone service than other business patrons. * * * But, even if the defendant were engaged to any material extent in the telegraph business in addition to its telephone business, I am of opinion that its obligations in respect to its telephone business must be determined with reference to that business alone, and that it has not the right to discriminate in charges for telephone service, merely because it may also be engaged in another branch of business which it desires to protect by such discrimination."

§ 283. Reasonable regulations for securing payment for service.—As the privilege of providing public utility service includes the right to collect a reasonable charge therefor, the corporation rendering the service is permitted in its own protection to require charges for such service to be paid in advance or where it is impossible to determine in advance the amount of the charges because they depend on the extent of the service used, the corporation may by reasonable regulations require the securing of the payment for such service by a cash deposit in advance, or in some such manner insure the making of the payment and thus avoid the loss due to failure to pay or the expense of making collection, all of which, if sustained, would ultimately be shifted to the customers who did pay with the effect of increasing the amount of their payment to the extent of such loss. The case of *Irvin v. Rushville Co-Operative Tel. Co.*, 161 Ind. 524, 69 N. E.

258, decided in 1903, furnishes a good statement of this rule together with the reason upon which it is based as follows: "Considering the quasi-public functions of corporations like the one at bar—corporations whose first duty is to the public whom they serve—we think that their revenues should not be depleted by the furnishing of service to individuals who refuse to pay because they are asserting collateral demands against it. * * * It can maintain an efficient service only through prompt payment of its dues and tolls, and because of that fact it may use the summary remedy of denying service for nonpayment. It can not be said it may be denied the benefit of this rule because a patron claims the company is indebted to him. It can not be required to stop and adjudicate claims against it. The law compels it to furnish service. A patron may take service or not, as he chooses. It must furnish efficient service to all alike who are alike situated, and must not discriminate in favor of or against any one."

To the same effect the case of *State v. Commander*, 211 Ala. 230, 100 So. 223, permits a distinction between paying and non-paying customers as follows: "It is insisted that Lammons was being discriminated against, and that his competitor, Metcalf, was not required to pay for the installation of this new wire. This insistence, however, overlooks the fact that Lammons and Metcalf were not in the same class, as the former was largely indebted to the municipality for current for the previous year, while the latter owed the town nothing."

While public utilities may make reasonable regulations and requirements for payment for services, they are liable in damages for any injury resulting where action for such purposes is unlawful or unreasonable, as was indicated in the case of *Glover v. Southern Cities Distributing Co.* (La. App.), 142 So. 289, where the court said: "As the defendant admits the act complained of was unlawful, and the plea of estoppel can avail it nothing, our sole remaining duty in the case is to determine the extent of the injury suffered by the plaintiff, for which the defendant is liable. * * * We have no doubt that plaintiff's children suffered intensely from the disconcerting, humiliating, and embarrassing situation, provoked without right or warning by the defendant. Five hundred dollars is a reasonable but conservative estimate of the damages. The plaintiff in her individual capacity, we think, suffered no appreciable injury, and the claim for expense for food was not proved with sufficient definite-

ness to serve as a basis for judgment. The demand in reconvention was properly allowed."

§ 284. **Discontinuing service for nonpayment.**—As a necessary consequence of this rule it follows that a customer who is in default for the payment of his service and who fails to pay for the service already rendered can not complain if the service is discontinued pending his payment for that already received. This is recognized as a convenient means of making collection, for as the court in the case of *State v. Board of Water & Light Comrs.*, 105 Minn. 472, 117 N. W. 827, 127 Am. St. 581, decided in 1908, said: "Both on reason and authority the method of collection here in issue was reasonable and proper. With unusual unanimity, such regulations have been sustained alike where there is statutory authority and where there is not. * * * The imposition of a fifteen-cent penalty or discount and of certain costs and expenses of shutting off the gas and turning it on as parts of the arrearage charged relator does not entitle relator to the mandamus he seeks."

Service may not be denied a later tenant before payment is received from a former tenant for service, as such a regulation would be an unjust discrimination, which is the effect of the decision in the case of *Nourse v. Los Angeles*, 25 Cal. App. 384, 143 Pac. 801: "It appears the water was supplied to the former occupant of the premises in question by meter, and therefore the rates were not due until the expiration of the month. But under the provision just quoted the city could have exacted a deposit in an amount equal to the estimated value of the quantity of water to be supplied, thus fully protecting itself against loss. It is therefore an unnecessary regulation, and as applied to petitioner, unreasonable in that, while he is not in arrears for any water furnished to him or supplied to another upon his order, it is nevertheless insisted that he pay the debt of another as a prerequisite condition to the city performing its duty to supply water to all its inhabitants without discrimination, and for a like reason is discriminatory against petitioner. While respondents do not seek directly to enforce payment of the charge against the property, they do, in withholding a legal right and by thus destroying the use of the property as a habitation, indirectly seek to compel petitioner to pay such charge. * * * Our conclusion is that the regulation in question is unreasonable in that, without statutory authority therefor, it makes one person liable for the debts of another and contravenes the duty as-

sumed by the city to serve all its inhabitants without discrimination. This view is sustained by overwhelming authority."

Unless there is statutory authority to make the cost of public utility service a lien on the premises, a new customer occupying the premises may not be denied service because a former occupant failed to pay for his service, for as the court said in the case of *Alabama Water Co. v. Knowles*, 220 Ala. 61, 124 So. 96, P. U. R. 1930B, 193: "Such reasonable rules, not in violation of law, are law-made rules, and, unless waived, govern the rights and duties of the citizen and of the water company. * * * Not that the company has any power to furnish or to deny service to whom it will. Its duty is to all alike, who are within the zone of the service applied for, who enter into proper contractual relations and who comply with the conditions precedent as to service lines and advance payments. * * * We follow the generally recognized rule that in the absence of statute making a service charge a lien on the premises, a new customer can not be denied service because some former customer is delinquent, nor a tenant denied service because his landlord may be in arrears; nor can payment of such arrears be required as a condition to such service."

While a public utility may refuse service until payment is made for it, it may not refuse to serve a present owner of premises because service to the premises were unpaid when it was owned by a different party, for as the court said in the case of *Willow River Power Co. v. Railroad Commission*, 197 Wis. 1, 220 N. W. 173: "The utility being in a situation where it can now furnish service to the present owners of the premises without any additional expenditure for equipment, it can not, as against a present owner of the premises, refuse him service because of unpaid liabilities of a former owner with which the present owners are neither by contract or law charged with responsibility, and for which they have in no wise assumed responsibility. That refusal of such service in a city to a present occupant of premises whose former occupant was delinquent in his obligations can not be based upon the ground that the obligations of a prior owner or occupant must first be met as a condition precedent to the right of service is not questioned here by appellant, and is well established by the authorities passing on such a question, among which are *Hatch v. Consumers Co.*, 17 Idaho 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263, with note; cases cited in note in 28 A. L. R. 486, and 13 A. L. R. 349. We can find no ground upon which a distinction can be made between such a

situation and the one here. The company has its wires installed and ready for service to the present owner or occupant of these two premises, and they are entitled to present service, and it is within the power and jurisdiction of the railroad commission to direct that such service shall be given."

§ 285. **Discrimination by rebates and free service.**—In *Kilbourn v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499, decided in 1912, is found an interesting illustration of the fact that discrimination in charges by way of rebates for such service is an evil practice of long standing which has continued down to current times. In holding invalid an agreement to give rebates for services rendered although it was outstanding when legislative action was enacted against the continuance of such a practice, the court said: "It could hardly be claimed under these sections of the public utilities law that a utility could, by resorting to any device or subterfuge, make a valid agreement with a consumer to furnish the latter with free current to the amount of \$3,500 per year; and the appellant does not so claim. Some of the main purposes of this law were to compel public service corporations to file their rates, so that they would be open to public inspection, to make reasonable rates of charge, and to make one consumer pay the same as another, where the service was furnished under substantially similar conditions. * * * The village of Kilbourn is one of the patrons of the defendant that is entitled to receive the same consideration in the matter of rates of charge that any other patron is entitled to receive—no less, no more. By taking advantage of a situation where it was able to force the defendant into making an unlawful contract, it can no more profit thereby than could any other purchaser of current from the defendant."

Free service even more than rebates constitutes the most flagrant case of discrimination and will not be tolerated, for as the court indicated in the case of *Charleston v. Public Service Comm.*, 86 W. Va. 536, 103 S. E. 673, P. U. R. 1920E, 823: "That the free water provision is discriminatory becomes apparent upon first glance. The company is entitled to receive a fair return upon its investment, and, when that has been determined, after proper investigation, rates must be so adjusted as to yield a net income equivalent to the return fixed. If the city receives its water free of charge, the burden of contributing to the sum named may rest solely or mainly upon the rate payer to the exclusion or partial exclusion of the taxpayer. The former pays not only for water which he uses, but also for that which the city

consumes, the benefit of which accrues to the citizens as a whole and for which they as taxpayers should pay. Service of this character is contrary to the policy of the Public Service Commission Act (Code C. 15-6). *Shrader v. Steubenville, &c. Traction Co.*, 84 W. Va. 1, 99 S. E. 207, and cases cited."

In fixing its charge for service, a public utility may not agree to remit a part of the rate to certain customers, for as the court said in the case of *Sierra & San Francisco Power Co. v. Universal Electric & Gas Co.*, 197 Cal. 376, 241 Pac. 76: "It is insisted by appellant that the contract of July 9, 1915, was not required to be filed with the commission, because it 'was a special contract not available to the general public.' To this contention the language of the statute is a complete answer wherein it is provided that every public utility shall file with the commission its rates or schedules and all contracts which in any manner affect or relate to rates. * * * When so considered, the arrangement may properly be termed a 'device' by which a portion, to wit, ten per cent, of the legal charge, was remitted to the defendant, in contravention of subparagraph (b) of section 17 of the Public Utilities Act. * * * While it may properly be said that the plaintiff was in duty bound to file the modified contract with the railroad commission, and, failing to do so, was subject to the penalties prescribed by law, it must also be said that the defendant was not wholly blameless, for it concurred in an arrangement which was contrary to the statute. * * * The statute expressly forbade the plaintiff to charge or receive compensation for electrical energy at any rate other than that specified in the contract duly filed. It therefore could not lawfully accept the amounts tendered by the defendant."

In addition to the illegality of granting rebates or preferential rates, the fact that if such practice were permitted it would require the charging of higher rates to others, which would be unfair because discriminatory, is the rule, and the reason on which it is based is illustrated in the case of *Bayonne v. Passaic Consolidated Water Co.*, 98 N. J. Eq. 174, 130 Atl. 530, where the court said: "The establishing and enforcing of a preferential rate in favor of one or more individuals would of necessity require the utility, if it is to live, charging correspondingly unfair, higher rates to others to offset the losses so sustained."

That free service to its stockholders and a different rate to its consumers, based on private agreements in each case, is not permissible and that a uniform rate fixed by the commission supplants any rate fixed by special contract is the effect of the de-

cision in the case of *State v. Department of Public Works*, 158 Wash. 462, 291 Pac. 346, P. U. R. 1931B, 184, where the court said: "Appellants say, as we understand, that because the water company has charged different rates to those who pay and at the same time furnished its stockholders whose property is located within lot three with free water, and that those on the outside who pay have agreed to do so by private contracts, therefore it is not a public service corporation and that it has never intended to hold itself out as a public utility. But those things are not the test by which its status is to be determined. In *State ex rel. Department of Public Works v. Higgins et al.* (Wash.), 283 Pac. 1074, 1075, the parties against whom the department of public works proceeded contended that they were not engaged in a public service, but private business only, and hence did not come under the Public Service Act. But this court held otherwise and in its opinion, upon referring to and quoting from the case of *Cushing v. White*, 101 Wash. 172, 172 Pac. 229, L. R. A. 1918F, 463, said that such cases '* * * must be determined by the character of the business actually carried on by the carrier, and not by any secret intention or mental reservation it may entertain or assert when charged with the duties and obligations which the law imposes.' * * * It must be held to be pretty well settled in this state that no corporation or other person actually engaged as a public utility can, by the simple device of entering into contracts with its customers and patrons, prevent the commencement of the exercise of the state's control or withdraw itself from that control while so engaged. It is equally well settled that by statute public service companies are subject to regulation and to the jurisdiction of the department of public works. By statutes of this state the term 'public service company' is defined as including, among other things, every water company. * * * The evidence in this case clearly and abundantly brings the Fruitdale-on-the-Sound Water Company within the terms of the law. The judgment of the superior court holding that the department has jurisdiction is affirmed."

§ 286. **Exchange of service.**—Discrimination as provided in special contracts between public utilities for certain exchange of service is upheld in the case of *Chicago Great Western R. Co. v. Postal Telegraph-Cable Co.*, 249 Fed. 664 (affd. in 248 U. S. 471, 63 L. ed. 365, 39 Sup. Ct. 162): "Under the second proviso hereinbefore quoted appellee could lawfully issue telegraph franks to the officers and agents of appellant. But is it unlaw-

ful to do under contract and for compensation what may lawfully be done without contract and without compensation?"

§ 287. **Public service.**—That rates and service favorable to the public may be made a valid term of the franchise contract is decided in the case of *Hollis v. Kutz*, 255 U. S. 452, 65 L. ed. 727, 41 Sup. Ct. 371, P. U. R. 1921C, 637: "On the merits, however, there is no doubt that the decree was right. We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished the public. But the notion that the government can not make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument, the district, shall be satisfied at any price that it may fix, strikes us as needing no answer. The plaintiffs are under no legal obligation to take gas, nor is the government bound to allow it to be furnished. If they choose to take it, the plaintiffs must submit to such enhancement of price, if any, as is assignable to the government's demands. We do not consider whether the commission has power to raise the price to the excepted class because, even if it has, the plaintiffs have no right to require equality with the government, and they have no other ground upon which to found their supposed right."

The city as a consideration for the granting of the franchise may stipulate for special rates and service, for as the court held in the case of *State v. Peninsular Tel. Co.*, 73 Fla. 913, 75 So. 201, 10 A. L. R. 501, P. U. R. 1917E, 453: "The bill of complaint proceeds upon the theory that the franchise rights for which the free and reduced rate phones are furnished to the city are of no value or else that nothing but cash payments can be received for telephone service. There is nothing in the statute to warrant either assumption. If the franchises granted to the company are not valuable, the agreement to furnish free or reduced rate phones in return for such franchises would not have been made. There is no allegation that such franchises are of no value. And as property rights may exist in the lawful use of the franchises, there is at least no presumption that they are without monetary value. The statute does not expressly or by fair implication require compensation for telephone service to be only in cash payments as the service is rendered. 'The charge' referred to in the first part of section 8, * * *, does not require that 'compensation' shall be made by cash payments. There is nothing in the bill of complaint to indicate that the franchise and privileges granted by the municipality to the de-

fendant telephone company are not of a value equal to the difference between the free and reduced rates allowed the city and rates for similar service that are charged the public generally."

Discrimination in favor of the public is upheld because not contrary to the statute or public policy in the case of Guthrie Gas, Light &c. Co. v. Board of Education, 64 Okla. 157, 166 Pac. 128, P. U. R. 1917E, 200, L. R. A. 1918D, 900: "No favoritism was allowed, but discrimination, founded upon reason and justice, was not unlawful. It is held that discriminations in favor of the public are not opposed to public policy, because they benefit the people generally by relieving them of a part of their burdens, and, in the absence of legislation prohibiting such discrimination, they can not be said to be illegal or contrary to public policy. New York Tel. Co. v. Siegel Cooper Co., 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560; Belfast v. Belfast Water Co., 115 Me. 234, 98 Atl. 738; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382. Such discriminations are not contrary to public policy in this state. * * * Where discriminations are in the interest of the public and benefit the people generally, they are usually favored by the courts. The beneficiaries thereof do not come into competition with any class of business, and no injustice is done to anyone unless the discrimination increases the cost of the service to the public generally, and where the discrimination does not inure to the undue advantage of one man in consequence of some injustice imposed on another, the same is upheld where not prohibited by statute or some rule of public policy."

By virtue of the provisions of the utility law, discriminations in favor of municipalities are declared to be illegal in the case of Public Service Electric Co. v. Board of Public Utility Comrs., 87 N. J. L. 128, 93 Atl. 707, P. U. R. 1915C, 229: "We think, however, that the Public Utilities Act, in forbidding discrimination, made the performance of this contract unlawful, and that, therefore, the prosecutor could not continue to perform the contract without being guilty of a violation of that statute. Thus we have the case of a contract lawful when made, the performance of which subsequently became unlawful. It is perfectly well settled that the effect of this is to excuse the promisor from performance. * * * This contention clearly ignores the spirit of this legislation. One of its objects was to abrogate the granting of gratuities to municipalities, and thereby prevent reciprocal favors from being granted to the donors. The evil sought to be eradicated was the insidious influence which might be ex-

exercised on municipal bodies and officers against the general public welfare, by the donors of such gratuities. Therefore, where it appears, as it does in this case, that the gratuity granted by the predecessor of the prosecutor to the city of Plainfield to light all its public buildings, offices, and rooms free of charge forever, because it has received the privilege of placing and maintaining its poles and wires in the streets and subways of the city of Plainfield, no other evidence is required or necessary than is furnished by the contract to demonstrate that the preference or advantage given by the contract is undue and unreasonable and within the inhibition of the Public Utilities Act. The fact that there was such undue and unreasonable preference or advantage given is sufficient basis to set aside the order made by the public utilities commissioners."

§ 288. Rates for service are not taxes and need not be uniform under constitution.—The rates charged for public utility service, however, are not taxes within the meaning of those constitutional provisions requiring uniformity of taxation, so that absolute uniformity of rates to customers is not required by such constitutional or statutory provisions; but in the absence of a statute to the contrary some courts, including that in the case of *State v. Birmingham Waterworks Co.*, 164 Ala. 586, 51 So. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. 69, 20 Ann. Cas. 951, decided in 1910, have held that any material reduction below the prevailing rate which was supposed to be a reasonable one would indicate that the prevailing rate was excessive and that it should be reduced accordingly, for as the court in the above case said: "And it must serve all with equal facilities and without discrimination. In this case no complaint is made that relator is discriminated against in respect to facilities furnished in the way of getting a supply of water, but only in respect to the price charged. It would seem that, if the rate granted to favored customers is less than the reasonable rate the company may lawfully demand from all consumers on a basis of uniformity, as on the allegations of the petition we must assume to be the case, the consequent discrimination is enjoyed by those having the favored rate at the expense of the company, and does not impinge upon any right of consumers generally, for they are receiving all they are entitled to have in any event. *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206, 30 S. E. 319, 41 L. R. A. 240, *supra*. The granting of a rate to any considerable number of consumers more favorable to them than the rate fixed for consumers generally, in the absence of possible peculiar circum-

stances of justification, would be evidential that the general rate is unreasonably high, which would call for municipal or legislative revision to be enacted in a due observance of constitutional limitations. But we do not see our way clear to a holding that, whenever a water company makes a concession to a consumer, it thereby fixes a new schedule of rates for all its consumers."

While utilities may not discriminate in their rates for service, the rates may vary according to the class of service and the cost of furnishing it, due to the location of the customer or the necessity of extending the service in the new territory, for as the court said in the case of *Levitt v. Public Utilities Comm. (Conn.)*, 159 Atl. 878: "It is generally recognized that in determining whether or not a public service company is to be required to build an extension to serve a customer or customers, the question is whether, in view of all the circumstances of the case, it is reasonable to compel it to do so. * * * As a public service company is not under a duty to extend its service at its regular rates except where it is reasonable that it should do so, it necessarily follows that it may, and sound policy dictates that it should, establish rates or conditions upon which it will build extensions beyond those limits. Reasonable classification of service and rates is permissible to a public utilities company, provided it treats alike all those who are similarly circumstanced."

A reasonable classification and discrimination in the charge for service, depending on the cost of furnishing it, will be sustained and extensions which will not sustain the cost of making them will not be required unless the applicants advance their cost, which may be refunded as the service is rendered. Extensions for service, that will furnish a return on the investment or cost of making them within a reasonable time, may be required without advances by the consumers, but a determination of what constitutes reasonable extensions is a question for the public service commission in the first instance and not for the court, as is indicated in the case of *State v. Public Service Comm. (Mo.)*, 42 S. W. (2d) 349, where the court said: "The burden of proof rested upon petitioners to show that the rule in question is unreasonable or unlawful. Section 5246, 5247, Rev. St. 1929; *State ex rel. City of St. Joseph v. Busby (Mo. Supp.)* 274 S. W. 1067. We agree with the commission that the evidence did not so show. It does not appear over what area the company's distribution system extends, but it seems clear that the company has not undertaken to serve every part of St. Louis county. To cover every part of that large territory with water mains would

be beyond its ability. Moreover, to make generally extensions that would not be remunerative presently or in the reasonably near future would not only overtax its resources, but would mean that it must operate without a fair return on its investment, perhaps even at a loss, or else that rates must be increased, throwing the additional burden on all consumers. * * * However, it is not our province to make rules for public service utilities. We have only to determine whether or not the assailed rule, which has the approval of the commission, is reasonable and lawful. It may be conceded that it is not always necessary that a particular extension shall be immediately remunerative or that there shall be no unprofitable extension. * * * But the company is not under the absolute and unconditional duty to extend its mains to any territory whenever requested irrespective of circumstances or conditions. Regard should be had to the reasonableness of the demand. * * * The evidence indicates that in this instance, * * * the extension could not be expected to make a fair return to the company presently or within any reasonable time in the future. Neither the utility nor its other consumers should be required to bear the burden that such extensions would entail if the company were forced to make them at its own expense. * * * The requirement that applicants for extensions deposit the cost in advance, to be refunded as provided in the rule, has been in force for a considerable number of years, and the commission's experience is that it has operated reasonably satisfactorily. We are not persuaded that it is unreasonable. * * * Discrimination is not unlawful unless arbitrary or unjust."

§ 289. Discrimination in favor of public or charitable purposes.—A discrimination in rates by way of a reduction for the services rendered for public purposes as well as services rendered charitable institutions in the absence of a statute expressly prohibiting such concessions has been sustained by a number of our courts. Indeed it is not uncommon to provide for free water service for use of the public in connection with the fire department, the parks and similar uses which is treated simply as a part of the consideration for the franchise privileges granted by the municipality receiving such service. As the court in the case of *Preston v. Board of Water Comrs.*, 117 Mich. 589, 76 N. W. 92, decided in 1898, expressed it: "The record also shows, as will appear more fully later, the rates fixed are equitable and reasonable. It has already appeared that the free use of water given is only to institutions in which the city and all its citizens

are interested, and, where a partial rate is charged, the recipient is a charitable institution or an educational institution in the maintenance of which the public is more or less interested.

* * * The board is very properly given wide discretion in the management of the water plant. *Detroit v. Board of Water Comrs.*, 108 Mich. 494, 66 N. W. 377. There is nothing in the record to show they have abused this discretion in fixing the rates. We think it is not accurate to speak of these rates as taxes. All property except that which is exempt by law is subject to the payment of taxes, but the use of water is not compulsory. * * * When property has paid its proportion of the taxes growing out of fire protection and other uses in which property and the public in general have an interest, it has discharged its share of the burden."

For the same reason concessions have been permitted to charitable institutions because their service is of a public nature and for the public good. A good statement of the principle permitting this discrimination is furnished in the case of *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560, decided in 1911, as follows: "The parties expressly stipulated that the charitable institutions in question are performing services of special benefit to the community as a whole, are worthy of charitable assistance, and have long been accustomed to receive contributions from members of the general public. They further stipulated that the discount to the city of New York was allowed on account of its intimate relation to the plaintiff, through its control of streets and its power of regulation, 'as a contribution to the expense and cost of the government of the city of New York.' The plaintiff received from the city for a small consideration a franchise of immense value, without which it could not carry on its business at all. While under no legal obligation to discriminate in favor of the city, there is a strong equitable obligation to do so, founded on benefits received, and supported by custom."

That public service may be given without unlawful discrimination because it is for the public benefit is the effect of the decision in the case of *Fretz v. Edmond*, 66 Okla. 262, 168 Pac. 800, L. R. A. 1918C, 405, P. U. R. 1918D, 381, P. U. R. 1918E, 466: "In exercising the discretion vested in them to fix rates to the various consumers, the city council are not bound therefore to give absolute equality of service and to fix an absolute equality of rate, but only to act so that there may be no arbitrary exercise of power or substantial injustice done. * * * It has often

been held that a municipality may exact of a private corporation, as a condition of a franchise, free service to itself or even charitable or religious institutions within its borders. * * * If a city, having power to engage in the same business, may lawfully exact of a private corporation certain conditions in conducting that business, certainly it must be true that the city itself may perform the same condition. * * * The contention that the city has the power in proper cases to give from the resources of its public service plants to public institutions or public uses without unjustly discriminating against the rights of its inhabitants seems to be supported by reason, logic, and abstract justice. * * * The public lavatories, rest rooms, public fountains, and public parks maintained by the cities, are all places where water is donated for the public good. So it must seem that water might be given for use in the city hall, or the city's public buildings. Does the rule extend to those institutions which are owned and controlled, not by the city, but by the state? We can see no good reason for the distinction between them, where the state institution of learning is located within the city and redounds, as it must, both to the benefit of the business activities of the city and to the intellectual and moral life of its inhabitants. The support of the institution must be for the public good."

§ 290. Inadequate supply no justification for discrimination.
—In the case of *State v. Consumers Gas Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245, decided in 1901, the defense to an action of mandamus by an inhabitant who had been denied public utility service was that the company was organized as a voluntary enterprise in the general interest of the people of Indianapolis and that its purpose was not the making of money but to furnish gas to consumers in that city at the lowest possible rate; that the amount of gas available was insufficient to supply the customers which the company then had; and that the effect of extending service to the party demanding it in this case would be a further reduction in the already insufficient supply. In holding this defense insufficient for the reason that the right to receive the service belongs in common to all living on the streets, where the service was furnished, the court said that the company could not exercise its rights and furnish service for the benefit of any class or of any part of the public less than the whole residing within the range of its service, for the undertaking of the company was with the state and the extraordinary powers including those of eminent domain were granted in con-

sideration of its undertaking to serve the entire community with the convenience of natural gas and not to render a service for the benefit of a few or to favorites; but that the service was a convenience available equally to every citizen similarly situated who might wish to avail himself of the privilege and was prepared to receive it, for as the court said: "The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22), and licensed by the city of Indianapolis to lay pipe lines through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their existence will bestow a benefit upon that part of the public in whose behalf the grant is made, and the benefit received by the citizen is the adequate consideration for the right and convenience surrendered by him. The grant thus resting upon a public and reciprocal relation imposes upon the appellee the legal obligation to serve all the members of the public contributing to its asserted right impartially, and to permit all such to use gas who have made the necessary arrangements to receive it and apply therefor, and who pay, or offer to pay, the price, and abide the reasonable rule and regulations of the company."

This principle is applicable as well between the states as within any one of them, and any attempt to discriminate between citizens of different states is prohibited by our laws of interstate commerce. As the court said in *State of Pennsylvania v. State of West Virginia*, 262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. 658, 32 A. L. R. 300⁵: "Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission, is a regulation of interstate commerce,—a prohibited interference. * * * The West Virginia Act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with that commerce. * * * In other

⁵ Affirmed in 263 U. S. 350, 67 L. ed. 1144, 44 Sup. Ct. 123.

words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do. * * * If the states have such power a singular situation might result. Pennsylvania might keep its coal, the northwest its timber, the mining states their minerals."

That as between consumers of gas in different states there must be no discrimination is the effect of the decision in the case of *United Fuel Gas Co. v. Public Service Comm.*, 95 W. Va. 415, 121 S. E. 281, P. U. R. 1924C, 280: "Being a public service company, it can not, like a private person, have complete liberty in choosing its customers. Under the circumstances shown, we agree with the finding of the commission that North Ravenswood is 'within the territory served by the defendant and within the scope of the present service, operation, and profession of the company.' * * * Our citizens do not want it all. They are willing to share with the citizens of other states, but equity and fair dealing requires that our people shall have their just share so long as there is gas to be had. We do not believe that the enforcement of the order will illegally interfere with interstate commerce of the company."

Discrimination is not permitted as between parties similarly situated in the giving of the service any more than in the rate charged for it, for all must be served on request within the territory being served, as is indicated in the case of *Allen v. Park Place Water, Light &c. Co.* (Tex. Civ. App.), 266 S. W. 219, where the court said: "A water corporation, such as the appellee in the present case, is a quasi-public corporation, and assumes the obligation to supply water to all who may apply therefor who reside within the territory in which the corporation undertakes to operate, provided the demand for such water is reasonable and within the capacity of the corporation. * * * Corporations which undertake to supply water for domestic purposes to any territory are required to do so without discrimination, and to treat all of those similarly situated within such territory alike with reference to service and rates. * * * We think it indisputably evident from the facts shown that the company thus formed and incorporated, at the time of such formation and incorporation, intended to supply water, light, and power to the residents of the anticipated or prospective town, whether wholly on the land formerly owned by the land company or not. * * * The rule above announced applies to the water company in the present case, notwithstanding the fact that, in dedicating the streets and alleys of the original Park Place subdivision, the

Land Company reserved the right to enter upon such streets and alleys to lay water pipes, gas pipes, set poles, etc., for, by the acceptance of its charter and by its acting by virtue thereof, it has become under the law obligated to supply water to all the residents of the town of Park Place who reside within a reasonable reach of its water mains to the extent of its ability so to do. * * * In speaking of the obligation of a water corporation, the court in the *Lumbard v. Stearns* Case, 4 Cush. (Mass.) 62, held that a water corporation may not furnish some houses and lots and refuse a supply to others, and thus give a value to some lots and deny it to others."

Where the supply is inadequate to serve all fully, the public utility is obliged to prorate the service, and a failure to do so gives the parties discriminated against a right to recover any damage sustained by that fact, as is indicated in the case of *Markham Irrigation Co. v. Brown* (Tex. Com. App.), 292 S. W. 863, where the court spoke as follows: "However, since the testimony is uncontradicted that a shortage of water did result from the unprecedented drouth and that the defendant in error did sustain damage resulting from an insufficient amount of water to produce his crop of rice, an issue was raised by the pleadings and the testimony whether the plaintiff in error was derelict in its duty under the terms of the contract to furnish such water and avoid such damage. * * * While the record is not very clear on the subject, it does show that a considerable quantity of water was furnished the defendant in error by the plaintiff in error under the terms of this contract, and that the defendant in error received benefits therefrom. * * * We therefore think that there was ample proof to have enabled the jury to fix the damages the defendant in error sustained from the entire loss of a crop on the 310 acres as a result of the plaintiff in error's alleged failure to legally prorate and so give to the defendant in error his share of the water it had under its control after the shortage occurred."

§ 291. Rule necessary to protect poorer classes especially.—As the case of *Birmingham v. Birmingham Water Co.* (Ala.), 42 So. 10, decided in 1906, expressed the reason for this rule: "Were the law otherwise, the municipal authorities might by collusion with the water company and acting in the interest of the more wealthy and influential class of citizens, make a contract, by the provisions of which the water tax would fall more lightly upon the wealthy and influential, at the expense of being

very burdensome upon the poorer or less fortunate class of citizens."

This principle is well expressed and its effect is clearly indicated in the case of *Birmingham Water Works Co. v. Brown*, 191 Ala. 457, 67 So. 613, L. R. A. 1915D, 1086, as follows: "Stability and equality of rates on the part of a public service corporation are more important than reduced rates. It was the fact that without a contract fixing the rates for water there would probably be instability and inequality of rates, and out of this instability and inequality, unjust discrimination, and other unlawful practices with reference to such rates, the city of Birmingham exacted the contract with appellant, and by that contract fixed a definite, uniform, maximum rate for residences in said city. The law must see that all citizens of the same class receive the same treatment at the hands of public service corporations, and the spirit which controlled the city of Birmingham in exacting this contract from the water-works company was the same spirit which actuated the congress of the United States in its legislation with reference to tariffs for freight transported by carriers engaged in interstate commerce."

§ 292. Suburban customer may be classified as such.—That the applicant for service located in the suburbs or outlying districts of the municipality may be placed in a separate class and subjected to different charges and conditions because of the distance he resides from the thickly populated district and of the sparsely settled condition of his neighborhood requiring a relatively greater expenditure and smaller return for the service rendered than in the more thickly, centrally located districts of the municipality is decided in the case of *Souther v. Gloucester*, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309, decided in 1905, where the court said: "The special cost of extending the system to the 'outlying section' in question; the fact that, even if water is wanted there for less than a year as a rule, the interest on the cost of the necessary special construction and on the construction of the works as a whole runs throughout the year; and the fact, if it is a fact, that there are but few persons who take water in this section, compared with the cost of extending the water system to it—are all of them matters which can be taken into account in fixing a reasonable rate. * * * The plaintiffs, in any event, can not complain that some discrimination is made between them and water takers in the heart of the city, and they have gone no further than that in their proof in the case at bar. There is not enough here to enable us to say that, provided some

discrimination can be made, the discrimination made is too great."

While a municipal public utility may refuse to render service beyond its limits, if it undertakes to do so, it must serve all suburban customers alike, which are similarly situated, for as the court said in the case of *Reigle v. Smith*, 287 Pa. 30, 134 Atl. 380: "When it thereafter continued the supply, it acted in its private capacity, and was subject to the same obligations as the original owner. All service was contingent upon compliance with such reasonable rules and regulations as the board of water commissioners might adopt. * * * The action of the municipal board is subject, however, to the control of the courts, where it discriminates or acts unreasonably (*Barnes Laundry Co. v. Pittsburgh*, 266 Pa. 24, 109 Atl. 535), as is the private water company to the orders of the public service commission (*Kauffman v. Pub. Serv. Comm.*, 81 Pa. Super. Ct. 48). In neither case can there be a distinction between those applying for service under like conditions. * * * In the present case, the borough could refuse to accept any customers beyond its limits, or along the line of its service main but, so long as the privilege was granted to some, it can not refuse it to others."

While uniform rates and service are required for the same class and those similarly situated, a classification between city and suburban subscribers is permitted, as is also a classification covering an improved service, which is more expensive to render and is made available to those desiring to pay the additional amount for the service. This principle is established and discussed in the case of *Campbellsville v. Taylor County Tel. Co.*, 229 Ky. 843, 18 S. W. (2d) 305, P. U. R. 1929D, 547, as follows: "The city contends that the franchise ordinance required the telephone company to furnish its subscribers country service the same as that rendered within the city. We are unable to find any provision of the franchise susceptible to that construction, or referring to that subject, and none is pointed out. The argument is predicated upon testimony to the effect that such was the understanding of the witnesses when the franchise was granted. The ordinance is plain and unambiguous and affords no basis for the belief that it contemplated or compelled any service not specified by its terms, which may not be enlarged by parol evidence. *Citizens Tel. Co. v. City of Newport*, 188 Ky. 629, 224 S. W. 187, 14 A. L. R. 1369. * * * The fact that free country service was rendered for a time imposed no obligation upon the telephone company to continue it. * * * It is

clear that the court was correct in its conclusion that the telephone company was under no legal obligation to supply free service outside the city. It is further argued for the city that the franchise must be construed to embrace all service furnished by the telephone company and that the subscribers are entitled to the improved or flash-light service on the same terms specified by the franchise ordinance for the magneto service. We are not prepared to say that the telephone company, under a franchise like the one here involved, is precluded from making an extra charge for an additional or improved service desired by the subscriber. So long as the telephone service required by the franchise is supplied at the rates fixed, the city is not concerned that a more expensive service may be rendered those willing to pay for it. It was proper for the franchise to provide the conditions under which, and the rates for which, the service should be rendered. * * * But it is no discrimination for the telephone company to provide extra facilities for extra pay so long as all subscribers under the same conditions are treated alike and the franchise obligations are performed."

§ 293. Quantity of service as basis of classification.—Many cases have permitted the public service corporation to make a reduction in its charges for service to a particular class of large consumers because of their capacity requiring an unusual amount of service or because of the nature of the use made of the service and the conditions upon which it is furnished. The case of *Logansport &c. Gas Co. v. Ott*, 30 Ind. App. 93, 65 N. E. 549, sustained a uniform reduction in the charge for gas service rendered laundries in a certain municipality. The service, however, was conditioned that it might be discontinued without notice at any time in the event of an insufficient supply. There being nothing in the franchise prohibiting such a special agreement being made, the court recognized that it was virtually an arrangement for disposing of the surplus supply by wholesale which might be on hand at any time and upheld the agreement.

The case of *Silkman v. Yonkers*, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827, affg. 71 Hun 37, decided in 1897, sustained a graduated scale of charges for water service depending upon the quantity consumed as provided in the statute, the court saying: "Surely, it can not be said to be unreasonable to provide less rates where a large amount of water is used than where a small quantity is consumed. That principle is usually present in all contracts or established rents of that character. It will be found in contracts and charges relating to electric lights, gas, private

water companies, and the like, and is a business principle of general application. We find in the rates as they were established nothing unreasonable, or that would in any way justify a court in interfering with them."

The cost of service decreases with the amount, and wholesale or reduced rates are permitted for large consumers. The court illustrated this principle in the case of *McRae v. Water Supply Co.*, 19 N. Mex. 65, 140 Pac. 1065: "For instance, it costs practically the same amount of money to install and equip a water-works system where the consumers would each use 200 gallons per day, they having the right to use as much more as they desired and the company being required to furnish such excess as required, as it would to install and equip the same where each customer used regularly a larger amount. And such company must install, necessarily, engines, pumps, and appliances capable of furnishing whatever amount the consumer may require. Each day it is required to operate its engines, pumps, and appliances and keep the necessary supply available. Such being the case, the company is enabled to supply a much larger amount, at a minimum expense, over the fixed charge of operation. For this reason, it is the policy of all such companies, uniformly, we believe, to encourage greater consumption of the commodity produced, by reducing the charge as the consumption increases. In other words, by a sliding scale of prices, to encourage the consumers to use a larger amount and thereby obtain the benefit of the decreased price. * * * Each consumer of water necessarily falls within one of the named classes and the rate he must pay for his water depends upon the class within which the amount of water used places him, and he can be charged for the services only the amount which may lawfully be exacted from water users within the given class."

In selling its surplus supply of gas at wholesale a public utility is not guilty of discrimination if all such sales are made on the same terms. This principle is well stated in the case of *Elk Hotel Co. v. United Fuel Gas Co.*, 75 W. Va. 200, 83 S. E. 922, L. R. A. 1917E, 970: "Having a supply of gas in excess of the quantity required for domestic consumption, especially during the summer months, defendant offered to supply the surplus at the rate charged to manufactories, located in or near the city, for consumption under boilers for the generation of steam, and included in its offer the several hotels in the city, among them the plaintiff's, provided they installed boilers in their buildings for heating by steam or by hot water instead of open fires and

grates, upon the condition, expressed in the contracts therefor, that when so equipped defendant would install two meters, one to measure the gas consumed under the boilers for heating purposes and charged for at the manufacturing rate, the other to measure the gas consumed for all other purposes and charged for at the domestic rate, reserving, in all contracts, for gas supplied at the reduced rate, the right to discontinue the service at such rate whenever defendant should deem the surplus necessary for its consumers, including hotels, served at the domestic rate. * * * An undue or unreasonable advantage or preference by a public service corporation results only from allowing to one person what it denies to another under substantially the same circumstances and conditions. 3 Moore on Carriers, 1795; Telegraph Co. v. Publishing Co., 44 Nebr. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. 729. Only unreasonable and unjust discriminations are unlawful. Or, differently stated, it is only when the discrimination inures to the undue advantage of one person, in consequence of some injustice inflicted upon another, that the law intervenes for the latter's protection. Hays v. Railroad Co. (C. C.), 12 Fed. 309; Hozier v. Railroad Co., 1 Nev. & McW. 27. Whether particular rates are unreasonable, or the conditions or circumstances substantially similar or dissimilar, are questions of fact to be resolved upon a consideration of the proofs in each case; the burden always being on the complaining party."

Discriminations which are based on reasonable classification are permitted as is a sliding scale of rates based upon the quantity used where the rate decreases as the amount used increases, but service under one contract must be furnished on a single account and the rate fixed accordingly. The application of this well-recognized principle is illustrated in the case of Bilton Machine Tool Co. v. United Illuminating Co., 110 Conn. 417, 148 Atl. 337, where the court said: "Discrimination as to service and rates may be based upon a reasonable classification. * * * Basing the charge or rate by a sliding scale upon the quantity used is an accepted principle of business administration as applied to public utility corporations, and this form of classification has been upheld by the courts where neither the classification nor the rates nor charges were unreasonable. * * * The classification, according to the sliding scale of rates adopted by the defendant, decreasing as the quantity used increased, was not an illegal mode of classification, nor, so far as appears, were the charges as made within the gradations of this classification unreasonable. * * * At this time there was only one

application or contract for service between these parties and justification for but one account and one bill. * * * There then could exist, properly and legally, only one account on defendant's books, and that was the account against the plaintiff. * * * The defendant was bound in law to furnish to the plaintiff electrical current without discrimination against it and to treat the plaintiff with equality as it presumptively did all of its patrons similarly situated. This the defendant has failed to do. The charges complained of were unreasonably discriminatory."

§ 294. Classification between old and new subscribers invalid.—The case of *Bradford v. Citizens Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. 513, decided in 1910, in recognizing the increasing cost of operating a larger telephone exchange held, however, that the charge to customers who became subscribers to the service after a particular date could not be greater than to the old subscribers because all were to be served with identically the same service and with the same fixtures, the court saying: "While it is probably true that the cost of operating a telephone exchange increases with the increased volume of business, it is equally true that the whole body of subscribers, whether new or old, makes the added expense, and reaps the added benefit. A telephone exchange with 1,000 members is manifestly more valuable to every subscriber than one with 100 members, but it is equally valuable to each member in the same class, and its value to the subscriber does not depend, in any degree, upon whether he is a new subscriber or an old one. It is difficult to understand why new subscribers should pay any more for the right to talk to old members than the latter do for the right to talk to new ones."

This principle is reiterated in the case of *Postal Tel. Cable Co. v. Associated Press*, 228 N. Y. 370, 127 N. E. 256, P. U. R. 1920E, 1, where the court said: "I think the plaintiff can not justify discrimination among customers by dividing contracts into new and old, and applying a different rate to each. The law says that under like conditions of service, charges shall be equal.

* * * Private wires have become an important branch of the telegraph business. They are given, not only to the press, but to bankers and brokers and many others. 50 Intrst. Com. Com'n R. 731, at page 738. They must be offered to those who need them with even-handed impartiality. A public service corporation is not at liberty to grant extraordinary facilities to one man, and arbitrarily refuse them to another. It need not depart

from the beaten track at all. If it does, it must not govern the deviation by prejudice or favor. What it grants to one, it must, in like conditions, when detriment would follow preference, grant impartially to all, within the limits of capacity."

§ 295. Nature of use of service not proper basis of classification.—Nor can the use to which the service is to be put be taken as the basis for discriminating in the charges for such service, so that whether gas be used for light or heat the charge must remain the same, although the substitute in the one case might be more expensive than in the other, for as was said in the case of *Bailey v. Fayette Gas-Fuel Co.*, 193 Pa. 175, 44 Atl. 251, decided in 1899: "It is not claimed that there is any difference in the cost of the product of the company, the expense of supplying it at the point of delivery, or its value to the company in the increase of business or other ways. * * * The real argument seeks to justify the difference in price solely by the value of the gas to the consumer as measured by what he would have to pay for a substitute for one purpose or the other if he could not get the gas. This is a wholly inadmissible basis of discrimination."

Regardless of the use which the consumer makes of the service, the public utility may not make a different charge for the same service to consumers similarly situated for this constitutes an unjust discrimination, as is indicated in the case of *Oklahoma Gas & Electric Co. v. Wilson*, 146 Okla. 272, 288 Pac. 316, as follows: "The court finds and holds: That the defendant Oklahoma Natural is authorized and does, by virtue of its charter powers, furnish natural gas to consumers residing within and adjacent to Oklahoma City, including domestic, industrial, and distributing patrons, and under the law and facts and circumstances as shown by this record, this defendant, Oklahoma Natural, is legally obligated to furnish this plaintiff with fuel gas. And in fact and in law this defendant is under a legal obligation to supply any and all applicants desiring gas service who are similarly situated to this plaintiff. * * * That this plaintiff is paying five cents per month per 1,000 cubic feet more than other consumers of natural gas similarly situated. That the defendant Oklahoma Natural is a public service corporation and as such is legally obligated to render equitable service to its patrons and to those similarly situated, who may apply for service. That the rate which this plaintiff is required to pay for gas is five cents per 1,000 cubic feet in excess of the rate fixed by the commission for consumers using 15,000,000 cubic

feet of gas per month, who are similarly located to this plaintiff. It therefore follows, and the court holds, that a refusal on the part of defendant Oklahoma Natural to supply this plaintiff with fuel gas under the facts and circumstances as shown by the record would be discriminatory and oppressive and would impair its legal obligation to the public generally, in the discharge of its public duty to the public, but more particularly to this plaintiff."

CHAPTER 14

LIABILITY OF WATERWORKS COMPANIES FOR FIRE LOSS

Section	Section
300. Consumer real party in interest.	318. Contract expressly assuming risk of fire loss.
301. Inhabitant may enforce franchise rights.	319. Reasons for denying recovery stated.
302. Franchise or contract for benefit of inhabitants.	320. Recovery held not in contemplation of parties.
303. Liability to consumer for fire loss from failure of water supply.	321. Recovery denied for want of privity between parties.
304. Recovery denied for governmental duty.	322. No recovery not expressly provided for in contract.
305. Right of municipality to recover for loss.	323. Acting in governmental capacity—No liability.
306. Expediency of rule refusing recovery.	324. Waterworks company subrogated for municipality.
307. Liability to customer for negligence.	325. Recovery denied, although expressly stipulated by contract.
308. Recovery by consumer in contract or for negligence.	326. No recovery contemplated in fixing rates.
309. Recovery by consumer as taxpayer.	327. Impracticable to permit recovery.
310. Customer, not municipality, real party in interest under contract.	328. Liability would require prohibitive rates.
311. Customer, party to contract, may recover.	329. Contract only with municipality to furnish water for fire protection.
312. Waterworks company not insurer.	330. Express contract for water service for fire protection necessary.
313. Duty under franchise to supply water.	331. Rate for service indicates no liability for fire loss contemplated.
314. Owner of property only party who can sue for loss.	332. Interest of taxpayer and consumer in contract only incidental.
315. Beneficiary of contract may sue for its breach.	333. Recovery only by party to contract expressly stipulated.
316. Consideration furnished by beneficiary.	334. Insurance payment.
317. Liability for fire loss contemplated by contract.	

§ 300. Consumer real party in interest.—As a general rule the rights created by the acceptance of the franchise and the undertaking of the municipal public utility to provide its service to all on the same conditions, which is the consideration for the grant of the franchise rights, as has already been shown, belong

to the inhabitants of the municipal corporation as well as to the corporation itself. The right of the inhabitants to receive proper service in accordance with the stipulations of the franchise on reasonable terms and conditions is generally recognized and may be enforced by the individual in his own name by virtue of the fact that he is an inhabitant of the municipality. Indeed, the inhabitant generally is the real party in interest and together with the corporation providing municipal public utility service is generally the only party really and ultimately interested in the matter; for except as to the public service rendered the municipality itself, its only interest is in seeing that the provisions of the franchise are performed and the rights of its inhabitants are secured in accordance with its terms.

§ 301. **Inhabitant may enforce franchise rights.**—With reference to the nature of the duty of public service corporations so well enunciated in the case of *Munn v. People of Illinois*, 94 U. S. 113, 24 L. ed. 77, the fact that the service is rendered to the public subjects it to public regulation and control in the interest of the public and for the benefit of any member thereof which may be especially affected or directly interested. This principle, therefore, is fully applicable to corporations providing municipal public utility service, and the case of *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, decided in 1906, furnishes an important decision in this connection, for it applies this principle to the matter of providing water service for the purpose of determining the rights of the individual inhabitants, who are or desire to become consumers of such service, to secure the same by an action in their own name in accordance with this principle which is best stated in the early case, that has long since become a leading one.¹

§ 302. **Franchise or contract for benefit of inhabitants.**—In the case of *Lawrence v. Fox*, 20 N. Y. 268, there was an amount of money due Lawrence from one Holly, and in consideration of a loan from Holly to Fox, he agreed to pay this debt of Holly to Lawrence; and upon this agreement, although he had nothing to do with the execution of the contract, Lawrence was permitted to recover against Fox because the agreement was made for his benefit. This case has been generally recognized wherever followed as deciding that "an agreement made on a valid consideration by one with another, to pay money to a third, can be enforced by a third in his own name. Nor need the third

¹ *Lawrence v. Fox*, 20 N. Y. 268.

person be privy to the consideration," according to *Secor v. Lord*, 42 N. Y. 525; "nor need he be named especially as the person to whom the money is to be paid."

As the court in this case of *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, *supra*, said: "The general principle that, if one person contracts for the benefit of a third person, such person may maintain an action on the agreement, has been applied since early in the seventeenth century in a large number of cases; the facts in each case differing to some extent. The leading case in England is *Dutton v. Poole*, 1 Ventris 318, decided in the reign of Charles II. * * * The court said: 'It might have been another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and the child, 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned.' * * * In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child or husband and wife, yet it can not be said that this contract was made for the benefit of a stranger. In the case before us the municipality sought to protect its inhabitants who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of opinion that the complaint states a good cause of action."

The decision of this case to the effect that the individual inhabitant of the municipality could in his own name compel the furnishing of a water supply to himself in accordance with the stipulations of the contract, and at the rates therein fixed, clearly establishes the principle, which is generally recognized by the courts, that such franchise rights are available to the inhabitants of the municipality as well as to the municipality itself, and that the individual inhabitants may enforce such rights by a proper action as an individual for the reason that they were created for his own benefit as well as for the advantage of the municipality and because he is the real party in interest.

§ 303. **Liability to consumer for fire loss from failure of water supply.**—The question, however, of the liability of the public service corporation for loss from fire due to its failure to provide an adequate water supply for the municipality and its in-

habitants, which makes this chapter necessary, is one which has occasioned much discussion and debate, and upon the decision of which our courts have expressly disagreed. A majority of the decisions on this point have held that there is no liability against the corporation furnishing water service to a municipality and its inhabitants, in accordance with the franchise, for damages to the inhabitant whose property is destroyed by fire because of the failure of the company to furnish an adequate supply of its service in accordance with its undertaking in the franchise. Many of the decisions to this effect are predicated upon the statement that the contract is one between the corporation furnishing the water and the municipality and that there is no privity of contract between the corporation and the individual inhabitant. Although payment for the waterworks plant and the water furnished is often made in part from funds raised by taxing the individual inhabitant and property owner of the municipality, he is denied recovery for the loss of his property from fire due to the failure of the water company to furnish an adequate supply of water, although this would have extinguished the fire and although this service was provided for in the franchise and was contemplated by all parties and expressly paid for.

§ 304. **Recovery denied for governmental duty.**—Some of the cases denying liability are based on the proposition that in contracting for water service for fire protection a municipality acts in its governmental capacity so that when the municipality itself furnishes water for such purpose, it could not be held liable to the citizen for a failure to furnish an adequate supply of water any more than for a failure to supply adequate service through its fire department; and because the municipality could not be held liable for the performance or failure to perform a governmental duty, the private corporation under contract with the municipality to provide water service is no more liable than the municipality itself. While the courts generally hold that the municipality is not liable to perform a governmental duty and that its furnishing of protection against fire is the performance of such a duty, which the municipality may or may not undertake and for the performance of which it can not be held liable to the individual citizen or property owner, the courts are by no means agreed that a private corporation under a franchise obligation to provide a water supply to the municipality and its inhabitants for all purposes is not liable for a failure to provide service for protection against fire equally with its failure to pro-

vide adequate service for any other purpose stipulated in the franchise.

§ 305. **Right of municipality to recover for loss.**—The power of the municipality to recover from the corporation, under contract to provide a water supply, for its failure to render adequate service as required by its contract or franchise has only been decided in a few cases. This liability is generally held to depend upon the nature of the franchise or contract entered into between the municipality and the company undertaking to furnish a water supply; and where the corporation merely undertakes to establish its plant and furnish a water supply without any express stipulation for service as a protection from fire loss, recovery for such loss, when sustained by the municipality, has been denied by an application of the principle, established in a majority of the cases with reference to loss sustained by the individual inhabitant, that unless the liability for fire loss is expressly stipulated for, it was not contemplated by the parties nor intended to be covered by their contract. This necessarily raises the question of the construction of the contract for the purpose of determining the intention of the parties to it on a point which is not stipulated in express terms and conditions; and as in the case of loss by the individual inhabitant the authorities are not agreed as to the right of the municipality to recover.

§ 306. **Expediency of rule refusing recovery.**—It is apparent, however, that the position, frequently maintained in the case of the loss by the individual, that no recovery can be had because there is a lack of privity of contract is not available as a defense to an action by the municipality itself which is a party to the contract. Naturally the increased risk to the corporation of holding it liable for such loss might result in such an increased charge for the service as to make such a provision inexpedient because of the increase in the rate and the enhanced cost to the municipality. However, a construction of the contract or franchise which refuses to find a right in the municipality to recover for the loss of its property due to an inadequate water supply, as provided for in the contract or franchise, is inconsistent with the principle of strict construction in favor of the municipality and of the doctrine of the implied powers of municipal corporations, which, as has already been shown, is so well established and generally accepted by the great weight of authority. The question, however, is one of construction and the

decisions vary in accordance with the different interpretations and the varying provisions of the franchises and contracts of municipalities for water service.²

² *United States. German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 57 L. ed. 195, 33 Sup. Ct. 32, 42 L. R. A. (N. S.) 1000.

Federal. New Orleans &c. R. Co. v. Meridian Water Works Co., 72 Fed. 227; *Boston Safe-Deposit &c. Co. v. Salem Water Co.*, 94 Fed. 238; *Guardian Trust &c. Co. v. Greensboro Water Supply Co.*, 115 Fed. 184, *affd.* in *Guardian Trust &c. Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 186; *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. 702.

Alabama. Lovejoy v. Bessemer Water Works Co., 146 Ala. 374, 41 So. 76, 6 L. R. A. (N. S.) 429, 9 Ann. Cas. 1068; *Ellis v. Birmingham Water Works Co.*, 187 Ala. 552, 65 So. 805.

Arizona. Warren County v. Hanson, 17 Ariz. 252, 150 Pac. 238.

Arkansas. Jones House Furnishing Co. v. Arkansas Water Co., 112 Ark. 425, 166 S. W. 557, 52 L. R. A. (N. S.) 402.

California. Ukiah City v. Ukiah Water &c. Co., 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. 107; *Niehaus Bros. Co. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045; *Luning Mineral Products Co. v. East Bay Water Co.*, 70 Cal. App. 94, 232 Pac. 721.

Colorado. Cardiff Light &c. Co. v. Taylor, 73 Colo. 566, 216 Pac. 711; *Public Service Co. v. Williams*, 84 Colo. 342, 270 Pac. 659.

Connecticut. Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1.

Florida. Mugge v. Tampa Water Works Co., 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. 207; *Woodbury v. Tampa Water Works Co.*, 57 Fla. 243, 49 So. 556, 21 L. R. A. (N. S.) 1034.

Georgia. Fowler v. Athens City Water Works Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. 313; *Gnann v.*

Coastal Public Service Co. (Ga. App.), 160 S. E. 807.

Idaho. Bush v. Artesian Hot & Cold Water Co., 4 Idaho 618, 43 Pac. 69, 95 Am. St. 161.

Illinois. Galena v. Galena Water Co., 132 Ill. App. 332, *affd.* in 229 Ill. 128, 82 N. E. 421; *Pennsylvania R. Co. v. Lincoln Trust Co. (Ill.)*, 167 N. E. 721.

Indiana. Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. 258; *Trustees of Jennie DePauw Memorial M. E. Church v. New Albany Waterworks*, 193 Ind. 368, 140 N. E. 540, 27 A. L. R. 1274; *Larimore v. Indianapolis Water Co.*, 197 Ind. 457, 151 N. E. 333; *Huntington v. Morgan*, 90 Ind. App. 573, 162 N. E. 255, 163 N. E. 599.

Iowa. Davis v. Clinton Water Works Co., 54 Iowa 59, 6 N. W. 126, 37 Am. Rep. 185; *Becker v. Keokuk Water Works*, 79 Iowa 419, 44 N. W. 694, 18 Am. St. 377; *Miller Grocery Co. v. Des Moines*, 195 Iowa 1310, 192 N. W. 306, 28 A. L. R. 815.

Kansas. Mott v. Cherryvale Water &c. Co., 48 Kans. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. 267.

Kentucky. Paducah Lbr. Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. 536; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 23 Ky. L. 2149, 66 S. W. 725; *Tobin v. Frankfort Water Co.*, 158 Ky. 348, 164 S. W. 956; *Mountain Water Co. v. Davis*, 195 Ky. 193, 241 S. W. 801; *Phillips v. Kentucky Utilities Co.*, 206 Ky. 151, 266 S. W. 1064; *Burford v. Glasgow Water Co.*, 223 Ky. 54, 2 S. W. (2d) 1027; *Danville v. Vanarsdale (Ky.)*, 48 S. W. (2d) 5.

Louisiana. Allen &c. Mfg. Co. v. Shreveport Water Works Co., 113 La. 1091, 37 So. 980, 68 L. R. A. 650, 104 Am. St. 525, 2 Ann. Cas. 471; *Planters Oil Mill v. Monroe Water Works &c. Co.*, 52 La. Ann. 1243, 27 So. 684.

§ 307. **Liability to customer for negligence.**—A number of well-reasoned decisions, from some of our strongest jurisdictions, including that of the United States Supreme Court, refuse to distinguish between the rights provided for in the franchise or contract in general, which all courts recognize as being available to the individual inhabitant, and the right to an adequate water supply for protection against fire, and hold that there is a liability to the individual inhabitant, who is a consumer of water service, for loss from fire due to an inadequate water supply for

Maine. Hone v. Presque Isle Water Co., 104 Maine 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021; Milford v. Bangor R. & Elec. Co., 104 Maine 233, 71 Atl. 759, 30 L. R. A. (N. S.) 531; Milford v. Bangor R. & Elec. Co., 106 Maine 316, 76 Atl. 696, 30 L. R. A. (N. S.) 526, 20 Ann. Cas. 622.

Maryland. Wallace v. Baltimore, 123 Md. 638, 91 Atl. 687.

Michigan. Anderson v. Iron Mountain Water Works, 225 Mich. 574, 196 N. W. 357.

Mississippi. Wilkinson v. Light, Heat & Co., 78 Miss. 389, 28 So. 877.

Missouri. Howsmon v. Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. 654; State v. Public Service Comm., 304 Mo. 505, 264 S. W. 669.

Nebraska. Eaton v. Fairbury Water Works Co., 37 Nebr. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. 510.

Nevada. Ferris v. Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485.

New Jersey. Knappman Whiting Co. v. Middlesex Water Co., 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467; Hall v. Passaic Water Co., 83 N. J. L. 771, 85 Atl. 349, 43 L. R. A. (N. S.) 750; Baum v. Somerville Water Co., 84 N. J. L. 611, 87 Atl. 140, 46 L. R. A. (N. S.) 966.

New York. Wainwright v. Queens County Water Co., 78 Hun (N. Y.) 146, 28 N. Y. S. 987; Van Alstyne v. Amsterdam, 119 Misc. 817, 197 N. Y. S. 570.

North Carolina. Gorrell v. Greensboro Water-Supply Co., 124 N. Car.

328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. 598; Fisher v. Greensboro Water-Supply Co., 128 N. Car. 275, 38 S. E. 912; Morton v. Washington Light & Co., 168 N. Car. 582, 84 S. E. 1019; Powell v. Wake Water Co., 171 N. Car. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302; Mack v. Charlotte City Water Works, 181 N. Car. 383, 107 S. E. 244; Mabe v. Winston-Salem, 190 N. Car. 486, 130 S. E. 169.

Oklahoma. Lutz v. Tahlequah Water Co., 29 Okla. 171, 118 Pac. 128, 36 L. R. A. (N. S.) 568.

Oregon. Pacific Paper Co. v. Portland, 68 Ore. 120, 135 Pac. 871.

Pennsylvania. Beck v. Kittanning Water Co., 8 Sadler (Pa.) 237, 11 Atl. 300.

South Carolina. Ancrum v. Camden Water, Light & Co., 82 S. Car. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029; Peeples v. South Carolina Power Co. (S. Car.), 164 S. E. 605.

Tennessee. Foster v. Lookout Water Co., 3 Lea (71 Tenn.) 42; Harris & Cole Bros. v. Columbia Water & Co., 114 Tenn. 323, 85 S. W. 897.

Texas. House v. Houston Water Works Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Dublin Elec. & Co. v. Thompson (Tex.), 166 S. W. 113.

West Virginia. Nichol v. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290.

Wisconsin. Britton v. Green Bay & Co., 81 Wis. 48, 51 N. W. 84, 29 Am. St. 856; Krom v. Antigo Gas Co., 154 Wis. 528, 140 N. W. 41, 143 N. W. 63.

the same reason and to the same extent that there is a liability for the failure to perform any other public utility service; for as the court in the case of *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 186, decided in 1906, said: "It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. * * * Even if the water company was under no contract obligations to construct waterworks in the city or to supply the citizens with water, yet, having undertaken to do so, it comes under an implied obligation to use reasonable care; and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort, and not for breach of contract."

§ 308. **Recovery by consumer in contract or for negligence.**—In recognizing the generally accepted rule that the special rights and privileges granted the corporation permitting it to render public utility service are in consideration that such service will be rendered adequately and to all without discrimination in accordance with the conditions stipulated in the franchise, the court, in the case of *Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.*, 115 Fed. 184,³ decided in 1902, held that one of the duties of a water company was to furnish an adequate supply of water for fire protection, and said, as did the Supreme Court of the United States, that recovery could be had for such failure in tort based on its failure to perform its obligation to the public generally, including the individual inhabitants and property owners who constituted its customers, the court saying: "The Greensboro Water Supply Company, as has been seen, was

³ Affirmed in 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 186.

under the obligation of a contract to furnish a full supply of water to the city and its inhabitants for sundry purposes, including that of fire. And under this obligation it was its duty to do so whenever needed. Besides this—indeed, to facilitate the performance of this obligation and in consideration of this obligation—it was clothed with valuable franchises, under which it used the streets of the city in laying its mains. Under its obligations, it was to furnish the city and its citizens with one of the necessities of life, and was bound to furnish all that desired it, who paid the price imposed. It served the public, and to this extent was a quasi-public corporation, bound to the discharge of a public duty.⁴ So it was the duty of the water company to furnish the water for fire—a duty arising out of an express contract, and out of the franchises granted to it for the purpose of public utility and need. It did not fulfill this duty. * * * The only question is, will an action, as for a tort, lie against a defendant who has negligently performed an express contract? We have seen that, in entering into this contract, the water company assumed a duty to the public. Mr. Chitty, quoted, *supra*, says that, under circumstances like these, the plaintiff may proceed either *ex contractu* or *ex delicto*. In other words, the negligence in not performing a contract of this character, whereby property has been injured, is a tort, as well as a breach of contract, and that on such a tort action will lie.”

Under a contract providing for the furnishing of an adequate water supply under sufficient pressure for the extinguishment of fires and fire hydrant service to both the public and individual consumers the company may be held liable to an individual inhabitant who sustains loss by fire because of an inadequate fire pressure or hydrant service, where the contract does not specifically exclude such liability. In holding that in such a case the question of liability is one of fact for the jury to determine, the court expressed the rule as follows in the case of *Peoples v. South Carolina Power Co.* (S. Car.), 164 S. E. 605: “The pivotal question, likewise, in this appeal, is whether the contract herein between the power company and the town of Barnwell was intended by the parties to, and did, impose liability upon the power company to individual inhabitants for fire losses sustained through the breach by the power company and its codefendant of the obligations imposed by the contract in reference to the

⁴ *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206, 30 S. E. 319, 41 L. R. A. 240.

furnishing of adequate water pressure for fire extinguishment. * * * Here, the power company got the privilege of using the waterworks system, constructed by the town with the funds obtained from the bond issue for that purpose, in which the power company had no investment at all, to sell water for a profit to the individual consumers. The consideration for the use of the works for such purpose was its agreement to furnish proper fire hydrant service and water pressure for fire extinguishment. Moreover, in the lease of its property, the town of Barnwell stipulated for, and the power company agreed to furnish, all 'present' fire hydrant service; the installation of certain equipment necessary to maintain 'present' fire insurance rates by keeping the water pressure at least equal to the pressure maintained by the town; and maintenance of the water system and pressure up to 'present' standard. * * * In the light of the allegations of the complaint herein, we do not regard the principle that parties ordinarily are presumed to contract for their own benefit controlling in the construction of the contract here presented. On the contrary, the considerations referred to tend strongly to the conclusion that the parties, in making the contract, may fairly be said to have contemplated the assumption by the power company of liability to the individual inhabitants of the town for its breach of the obligations imposed upon it under the contract in reference to the maintenance of the fire protection stipulated for. This conclusion would seem to be strengthened by the fact that the contract nowhere specifically limits the liability of the power company in this respect. Nor can the alleged inadequacy of rental paid by the town to the power company for hydrant service influence as a matter of law the construction of the contract in favor of the power company. The fire hydrant service, according to the contract and the complaint, was practically the sole compensation to be paid by the power company for the use of the waterworks and system. Aside from the furnishing of such fire protection, the operation of the plant was for the company's own profit. * * * Where, however, the waterworks are established under the statute by the municipality with its capital, and where the contract or lease to a private company does not stipulate the consequences of the breach by the company, and particularly where the sole compensation to the town for the use of the system erected and paid for by it is the agreement to furnish sufficient and efficient fire protection, the contract should specifically exclude and limit the liability to the individual inhabitants, or such liability may be deemed to exist.

In any event, in cases like the instant, where there is an absence of limitation upon the company's liability, coupled with considerations which may fairly tend to show an intention that the liability in question should exist, the contract is rendered ambiguous and uncertain. Its construction then becomes a question of fact for the jury under well-established principles. * * * Continued failure to furnish adequate pressure for fire extinguishment might produce a notice of cancelation of the contract by the town. During the six months intervening between the date of this notice and surrender of the property, the inhabitants, for whose benefit the fire protection was intended, would be remediless and unprotected against the dangers incident to the very breaches that necessitated the termination of the contract. * * * It is our opinion that the contract under consideration can not be construed as a matter of law to relieve the power company of liability to individual inhabitants for fire losses which may be sustained by them as the result of a tortious breach of the obligations imposed by the contract, in reference to furnishing hydrant service and water pressure for fire protection. The contract being ambiguous and uncertain in this particular, its construction is for the jury."

§ 309. **Recovery by consumer as taxpayer.**—These cases just mentioned base the liability on the broadest possible ground permitting a recovery in tort by an action of any property owner who has contracted for a water supply and they do not limit the liability to such as was contemplated by the parties when the contract was made, but base it on the general undertaking in connection with the franchise grant itself to furnish adequate service in accordance with its terms. The case of *Fisher v. Greensboro Water-Supply Co.*, 128 N. Car. 375, 38 S. E. 912, decided in 1901, is a leading decision of the Supreme Court of North Carolina, which permits recovery for fire loss due to an inadequate water supply at the hands of an inhabitant because he is a taxpayer and a property owner of the municipality whose property was destroyed. In the course of its decision the court said: "The plaintiff alleges that defendant had obligated itself (among other things) to furnish to the city of Greensboro an ample supply of water, and the necessary machinery, engines, appliances, etc., for protection against fire; that he, an inhabitant and taxpayer of said city, owned the Benbow House, a four-story hotel, there situate, which was burned in June 1899, and that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the city of Greens-

boro and its inhabitants, under the said contract, and by virtue, also, of the duties, obligations, and responsibilities which it assumed when it undertook to supply water to the city of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city, and derived by said city from taxation on the inhabitants thereof, and particularly on the plaintiff, a property owner, as aforesaid, and a taxpayer in the said city of Greensboro.' * * * We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation, and a consequential damage to the plaintiff."

§ 310. **Customer, not municipality, real party in interest under contract.**—The same court in the case of *Gorrell v. Greensboro Water-Supply Co.*, 124 N. Car. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. 598, decided in 1899, in permitting a recovery for loss from fire due to an inadequate water supply, while admitting that the individual sustaining the loss was not a party to the franchise contract nor privy to that contract, recognized that he was really the party for whom the contract was made and the service provided, while the municipality was simply the nominal party acting in effect for its inhabitants who were the real parties interested and the beneficiaries of the contract, whose money collected by way of taxation and for water rentals met the expense and paid for the service, and in the course of the decision said: "It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease, and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits, and payment made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with an adequate supply of water, and the protection of their property from fire, was the largest duty assumed by the company. One not a party

or privity to a contract, but who is beneficiary thereof, is entitled to maintain an action for its breach."

In sustaining the authority of the Gorrell decision and the right of the individual to recover for fire loss this court set forth its reasons for so deciding, in the case of *Morton v. Washington Light & Water Co.*, 168 N. Car. 582, 84 S. E. 1019, as follows: "The principles announced in *Gorrell v. Water Co.*, 124 N. Car. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. 598, established the liability of the defendant to the plaintiffs upon the facts found by the jury and those admitted in the pleadings, and the defendant, realizing this, asks us to overrule that case. We have therefore re-examined the decisions in this and other jurisdictions, and the arguments and reasoning upon which they rest, and after full consideration have determined to adhere to the former ruling of this court. It may be conceded, as contended by the defendant, that the weight of authority, measured by number, is against the decision in the Gorrell case, but this was known and considered at the time of its rendition, and since then, instead of receding from the position then taken the doctrine has been affirmed. * * * Another reason for refusing to sustain the position of the defendant is that it entered into contract with the city of Washington in 1901, two years after the Gorrell case was decided, and as all laws relating to the subject-matter of a contract enter into and form a part of it as if expressly referred to or incorporated in its terms (*Lehigh Water Co. v. Easton*, 121 U. S. 391, 7 Sup. Ct. 916, 30 L. ed. 1059; *Wooten v. Hill*, 98 N. C. 53, 3 S. E. 846), it was within the contemplation of the parties at the time the contract was made that the defendant would be liable to the citizen for loss by fire caused by its negligent failure to perform the terms of the contract, as held in the Gorrell case, and to hold otherwise now would relieve the defendant of a responsibility which it knowingly assumed."

To the same effect this court said in the later case of *Powell v. Wake Water Co.*, 171 N. Car. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302, that: "The provisions in the contract between the city of Raleigh and waterworks company upon which the receiver relies to take this case out of the principle adopted in *Gorrell v. Water Co.*, 124 N. Car. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. 598, are in substance the same as those in the contracts considered in *Jones v. Water Co.*, 135 N. Car. 553, 47 S. E. 615, and *Morton v. Water Co.*, 168 N. Car. 582, 84 S. E. 1019; and we therefore hold, following these authorities, that the

News & Observer Publishing Company had a right of action against the defendants as receivers of the waterworks company upon the allegations of negligence contained in the petition."

§ 311. **Customer, party to contract, may recover.**—While the customer for water service necessarily assumes the risk of loss in case the fire can not be extinguished with such a water supply as is provided for in the franchise, the court in the case of *New Orleans &c. R. Co. v. Meridian Waterworks Co.*, 72 Fed. 227, decided in 1896, held that the customer does not take the additional risk of loss from fire due to a failure to furnish the supply of water provided for in the franchise and that where the loss is due to this failure the recovery can be had against the waterworks company for its failure to furnish the supply called for by the franchise. The court said: "But the breach upon which the pleadings herein show this action to be founded occurred when the defendant failed to furnish plaintiff's servants with an adequate supply of water, at not less than sixty pounds pressure, as contracted for; so that such servants might, with the use of water under that pressure, have done all that was practicable to save plaintiff's property. The defendant agreed to furnish that pressure of water, as the plaintiff alleges, for fire purposes; and plaintiff took on itself the risk as to the effectiveness or sufficiency of water at such a pressure to extinguish such fires as might threaten said company's buildings. * * * But the plaintiff had contracted for an adequate supply of water at such pressure, and, when the emergency came, the railway company was entitled, under a reasonable condition of things, to the use of water at that pressure, to aid its servants, to that extent, to extinguish the fire. Under the pleadings, plaintiff's evidence, not objectionable under the well-established rules as to the admissibility of evidence, applicable under such a state of case, might have authorized a recovery of damages."

§ 312. **Waterworks company not insurer.**—The decision in the case of *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 243, 49 So. 556, 21 L. R. A. (N. S.) 1034, decided in 1909, is similar to the one last referred to in holding that the law does not require the water company to become an insurer of all the property for which it contracts to furnish water service, but that the party whose property is destroyed because of the failure to furnish the service contracted for is the party really affected by the failure, because it resulted in his loss, for which he is allowed a recovery, based on the relation of a customer thus

established between himself and the company undertaking to furnish the service, for as the court said: "The duty the defendant owed to the plaintiff by virtue of the public service engaged in by the defendant was to supply the hydrants near the plaintiff's property with water as legally required; such water to be used by others in extinguishing fire on the plaintiff's premises. The law imposes upon the defendant no duty to insure the property or to extinguish fires. The plaintiff has no right of action for a failure of the defendant to furnish water where the plaintiff's property was not located, if such failure was not a proximate cause of the burning of the plaintiff's property. * * *

The failure of the defendant to furnish water where the fire existed before reaching the plaintiff's property does not appear to be the agency that proximately caused the fire to destroy the plaintiff's house. * * *

The defendant was not responsible for starting the fire, and was under no duty to the plaintiff to extinguish it where it started; but the primary duty of the defendant to the plaintiff was to supply water as lawfully required for extinguishing the fire when it reached plaintiff's property. * * *

If the defendant is responsible for the destruction of the plaintiff's property, there is liability; and there can be no doubt that the plaintiff, whose property was destroyed, is the real party in interest, and is the proper plaintiff here. * * *

When a public service corporation, chartered for the purpose, exercises franchises and actually undertakes, for a compensation paid from a special tax levy, to render the public service of supplying to a city and its inhabitants water adequate for all purposes, including fire protection to the property of the city and its inhabitants, a relation between the corporation and the individual property holder is thereby established, which, by implication of law, imposes reciprocal duties and obligations upon the parties."

§ 313. **Duty under franchise to supply water.**—That recovery can be had for negligence in failing to discharge the duty of furnishing an adequate service, which is a consideration for the granting to the company of its franchise privileges is the effect of the decision in the case of *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. 207, decided in 1906, as stated in the following language: "We are of opinion that the defendant in error, enjoying, as it does, extensive franchises and privileges under its contract, such as the exclusive right to furnish water to the city and its inhabitants for thirty years, the right to have special taxes levied on the property of the citizen for its benefit, the right to use the

streets with its mains and hydrants, the right to charge tolls and regulate the use of water, not to mention others, has assumed the public duty of furnishing water for extinguishing fires, according to the terms of its contract, and that for negligence in the discharge of this duty, whereby the fire department, adequately equipped and prepared, was not furnished with water according to the contract, and the property of the property owner was on account of such negligence in furnishing water, destroyed, it is liable to him for the damages suffered in an action of tort."

§ 314. **Owner of property only party who can sue for loss.**—A municipal corporation is never held liable to the owner for the loss of his property from fire, and the municipality can not recover against the water company for a loss from fire sustained by the individual inhabitant because it is not the party in interest which sustains the loss, but a recovery by the inhabitant himself against the company is permitted and constitutes the only means by which a recovery can be had, for as the court, in the case of *Graves County Water Co. v. Ligon*, 112 Ky. 775, 23 Ky. L. 2149, 66 S. W. 725, decided in 1902, said: "On July 30, 1891, the city of Mayfield made an ordinance providing for a supply of water and for electric lights for the city, by which it granted to appellant the franchise of supplying the city and its inhabitants with water and electric lights for a period of twenty-five years, appellant to keep a sufficiency of engine and boiler power, so that, if one engine or pump should get out of fix, there would be others which might be used for pumping water; all mains to be of suitable size, and to furnish an abundant supply of water. * * * On June 26, 1901, a fire began in a house in the city, which spread to and burned appellees' house from the want of water in the hydrants, there not being sufficient pressure to throw a stream of any size more than from two to five feet. There was no water in the tower, and the firemen were unable to get water to check the fire. By reason of this fire spread to appellees' property and destroyed it. * * * It is universally held that the city is not liable to the property owner for the loss of his property. It is equally clear that the city can not sue the water company and recover damages for the loss of private property. The result is that, if the owner can not himself sue for the loss of his property, he is without redress, although his property has been destroyed by the breach of a contract made for his benefit by the city. We are not prepared to so hold."

§ 315. Beneficiary of contract may sue for its breach.—The same court in the case of Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. 536, decided in 1889, in sustaining a recovery for such loss due to the failure of the water company applied the principle enunciated in the case of Lawrence v. Fox, 20 N. Y. 268, *supra*, and generally accepted by most of our courts that a contract made for the benefit of a third person based on a good consideration is available to that third person, although the consideration did not pass directly from him to the party liable on the contract. To refuse recovery and hold otherwise, the court observed, would render the agreement meaningless and of no effect for any purpose, for as the court said: "But, we think, if there be in fact consideration for a promise or engagement made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued. * * * For this court has held the doctrine well settled that a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him. * * * And it being alleged in the petition, and also, in effect, provided in the ordinance of the city council that contains the terms and conditions of the contract, that it was made for the benefit of the inhabitants, it seems to us that, if appellee can be made answerable in damages at all, it is liable to appellant upon the facts stated in the petition. * * * It seems, if the contract before us is not to be treated as meaningless and totally ineffectual for every purpose, the parties to it must be regarded as having contemplated and assented to the consequences of non-performance, as well as the profit and advantage of performance, and consequently appellee is liable in this case for such damages as its failure or refusal to perform may have caused to appellant."

The principle sustaining the right of recovery for fire loss was upheld by this court in the case of Mountain Water Co. v. Davis, 195 Ky. 193, 241 S. W. 801: "Contrary to the holding of the great majority of courts we have held since the opinion in the case of Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. 536, that a citizen may sue in such cases to recover damages produced by fire and sustained by him for the failure of the water company to furnish the quantity of water and pressure required by its franchise contract."

This same court which permitted a recovery for fire loss by

the individual sustaining it, refused recovery for such a loss at the hands of an insurance company which had insured the individual consumer, for the reason that the contract was neither made with nor for the benefit of the insurance company, and that to permit recovery for its benefit would require the water company to bear the cost and liability of insuring its consumers, although they had paid for insurance independently of their contract for water service. In recognizing that much larger rates would be necessary in case water companies were held liable for fire losses to insurance companies, which had been paid for carrying this risk, the court denied recovery in the case of *Burford v. Glasgow Water Co.*, 223 Ky. 54, 2 S. W. (2d) 1027, by saying: "Here the fire was not caused by a tort on the part of the water company. The most that can be said is that the loss might have been averted if the water company had complied with its contract. Therefore the case is one where it is sought to make the water company liable, not merely to a citizen and property owner who was not a party to the contract, but to a third person with whom such citizen and property owner had contracted for insurance against fire. * * * Not only so, but there are other reasons why the water company should not be held liable. Even if it be conceded, without deciding, that the case is one where 'the fire was caused by the act or neglect of any person or corporation, private or municipal,' it must not be overlooked that the water company is not a party to the insurance contracts providing for subrogation. Therefore the contracts themselves are not sufficient to uphold the right of subrogation unless the facts and circumstances are such as to call for the application of that doctrine. * * * But the water company was not guilty of a tort. Its liability is predicated solely on the breach of its contract to furnish sufficient facilities to extinguish the fire. On the other hand, the insurance companies are liable because they have been paid by the proper owners to indemnify them against loss by fire. In paying this loss, they merely discharged their own debt and not a debt for which the water company was primarily liable. * * * The water company is entitled to live and to make a fair return on the investment. To meet the increased liability, higher water rates will be necessary. The added burden will fall on the consumers. The result will be that the citizens and property owners will not only pay for fire protection premiums sufficient to cover the risk assumed, but will also pay higher water rates for the purpose of relieving the insurance companies of the liability which they have been paid to assume.

In our opinion this will operate oppressively on the people, and will run counter to a sound public policy. We therefore conclude that, in the circumstances presented, the doctrine of subrogation should not be applied in favor of the insurance companies."

Although a municipality, contracting to furnish water for domestic purposes and for protection against loss by fire, may be liable under its contract for a failure to do so, where the municipality contracts for such service with a private company, recovery is denied an individual for a loss by fire, because the contract for this service was between the municipality and the water company, which relieved the municipality from such liability. This limitation of the general rule in this jurisdiction, permitting recovery for fire losses, is established and clearly enunciated as follows in the case of *Phillips v. Kentucky Utilities Co.*, 206 Ky. 151, 266 S. W. 1064: "The city of Elizabethtown having entered the field of commerce by undertaking to furnish to plaintiffs water for domestic purposes, and for protection against fire as alleged in the plaintiffs' petition as amended, is liable for damages resulting from its failure so to do, just as a private citizen would be who had undertaken to do the same thing. This furnishing of water for domestic use and protection against fire is a service which is rendered to those only of its residents who individually applied and paid therefor. * * * Elizabethtown is not liable, however, for failure to furnish an adequate public fire protection. This is a service which it furnished to all of its residents without making a special charge therefor. The city's demurrer should have been overruled. * * * In the case at bar, whatever duty devolved upon the Kentucky Utilities Company arose from the contract. The law imposed no duty upon it to furnish power to the city for pumping its water. Under the above-stated principle, since the obligation arose under the contract, the city, being the other party to the contract, alone could maintain an action. * * * Those contracts were made for the benefit of the city, and for its benefit alone, in carrying out its business of furnishing a water supply. It is a very different state of case when the city, instead of assuming itself to engage in the business of furnishing a water supply, makes a contract with an independent company to furnish water for fire protection to its inhabitants. In such a case, the contracting company takes the responsibility from the shoulders of the city and assumes the burden that the city of Elizabethtown retained in this case. There is no analogy at all between a case where a water company agrees to furnish adequate fire protection for the benefit of the

inhabitants of a municipality, and a case where coal dealers agree to furnish coal, or a pump manufacturer agrees to furnish a pump, or a blacksmith agrees to replace a broken part, or a power company agrees to furnish electric power to the city as a necessary incident to the construction or operation of the municipal water plant. Hence the demurrer of the Kentucky Utilities Company was properly sustained."

§ 316. **Consideration furnished by beneficiary.**—After indicating that the funds used in the payment of the water service come directly from the customers and that the franchise rights are provided for their special benefit, the court in the case of *Planters Oil Mill v. Monroe Waterworks & Light Co.*, 52 La. Ann. 1243, 27 So. 684, decided in 1900, said: "Municipalities are the people acting in their corporate capacity. It was the people's money that was paid the water company. It was for the benefit of the people that the promise was made on part of the company to supply water for extinguishing fires. Ostr. Ins., section 383. If it were to the public that the promise of the contract was made, then it was to 'the public as composed of individual persons.' The municipality was but the agent of the public as thus composed. Its acts in the matter of the contract under consideration were chiefly fiduciary. The beneficiaries are the corporators. It will not do to say the water company owes them no duty. While not deciding or intending to decide outright that plaintiff is entitled to recover against the water company on account of the contract made by the latter with the city of Monroe, we are yet of the opinion that, taking the allegations of the petition as true for the purpose of the trial of the exception, a sufficient legal cause of action against the company is disclosed to send the case to trial on its merits."

§ 317. **Liability for fire loss contemplated by contract.**—Because the contract itself provided for water service as a fire protection and the parties to the agreement understood that any damages resulting by fire loss from a failure to render adequate service would constitute a material breach of that contract, recovery for such damages was sustained in the case of *Harris & Cole Bros. v. Columbia Water & Light Co.*, 114 Tenn. 328, 85 S. W. 897, decided in 1905, where the court spoke as follows: "The bill distinctly avers that the defendant contracted to supply at all times an amount of water ample to extinguish fires, and failed to do so, and that this failure was the occasion of the loss sustained by complainants. The failure to furnish water did

not occasion the fire, but it is averred that it did bring about the loss resulting from the fire. To prevent this loss by supplying a quantity of water sufficient to extinguish any fire which might occur was within the letter of the contract. * * * It is true that, where an action is brought to recover for a breach of a contract, 'the contract itself must give the measure of damages,' yet, in the light of the averments of the bill in this case, it was clearly within the contemplation of the parties to this contract that, if it was breached by defendants, then it should furnish full indemnity of the damages resulting from the breach."

§ 318. **Contract expressly assuming risk of fire loss.**—In an opinion basing recovery expressly on the contract, the court in the case of *Knappman Whiting Co. v. Middlesex Water Co.*, 64 N. J. L. 240, 45 Atl. 692, 59 L. R. A. 572, 81 Am. St. 467, decided in 1900, sustained a recovery for loss due to fire from a failure to furnish an adequate water supply, for as the court said: "The principle underlying all these cases is that where the contract is express, as it is in this case—to furnish water with a pressure sufficient for fire purposes—to do a thing not unlawful, the contractor must perform it; and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. * * * The water company expressly contracted to supply water for fire purposes. The company failed to do so, and the premises of the defendant took fire, occasioning a considerable loss. Assuming that this result was due to the breaking of the pipes, without any fault on the part of the water company, we have a loss to be borne by one party or the other. In such a condition of affairs, to adopt the language of Mr. Justice Whelpley, 'Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it.'"

§ 319. **Reasons for denying recovery stated.**—In opposition to the principle which the above cases enunciate and support, the following cases, including that of *Wainwright v. Queens County Water Co.*, 78 Hun 146, 28 N. Y. S. 987, decided in 1894, held that the public service corporation providing the water supply to a city and its inhabitants is not liable to the individual customer and property owner whose property is destroyed by fire because of an inadequate water supply, due to its failure to provide water service in accordance with the provisions of the franchise. While these decisions do not agree as to the reason for so holding, the position taken by most of them is that such

a liability was not in the minds of the parties to the agreement and that they did not contemplate that such a loss when sustained in this manner should be borne by the corporation failing to furnish adequate service; that the corporation is not an insurer nor was it intended by the parties that it should be held liable to that extent; that in case the municipality undertook to provide a water supply for fire protection, it would not be liable for a failure to furnish an adequate service for this purpose because the action would be governmental rather than proprietary, and that therefore the private concern should not be held liable; and finally that there is no privity of contract or consideration between the individual customer and property owner and the corporation undertaking to furnish water service to himself and the other inhabitants of the municipality as well as the municipality itself. The New York case just mentioned in refusing to find a liability for the destruction of property by fire because of an inadequate water supply is materially limited in its effect, if in fact it is not overruled by the later case of *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, *supra*, which has already been discussed. The question of the rights and liabilities of the parties to the contract is determined by the construction of its terms and conditions with a view of ascertaining the intention of the parties to it, and as this intention with reference to the liability in question is not expressed, the matter is left open to judicial conjecture; and has become a very much disputed question of fact, upon which the courts have taken diametrically opposite positions.

§ 320. Recovery held not in contemplation of parties.—The following language in the decision of the *Wainwright* case indicates that the court believed that the liability was not covered by the contract nor contemplated by the parties to it, which, of course, is directly in conflict, both as to the decision and the reason upon which it is based, with the *Knappman Whiting Co.* case just discussed: "I do not see that the relation of the individual taxpayer to the company that agrees to supply water is any different than it is towards the person who sells the fire engine or the hose to the fire district. The power of the district to contract in all cases is the same, and derived from the statute. But if, from the bursting of a defective hose or the breaking down of a defective engine, the extinguishment of a fire was made impossible, the owner of the destroyed property would have no right of action against the vendor of those appliances. Privity of contract is an essential element to an action founded on a

breach of contract, and, whether the action for damages resulting from the breach be in form on contract or for a wrong, it can only be maintained by a party to the contract."

§ 321. **Recovery denied for want of privity between parties.**—That the weight of authority is against recovery on this liability for the reason that there is a want of privity between the customer and property owner sustaining the loss and the corporation undertaking to furnish the service is accurately stated in the case of *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 41 So. 76, 6 L. R. A. (N. S.) 429, 9 Ann. Cas. 1068, decided in 1906, where a large number of authorities to this effect are cited. After expressly recognizing "that the absence of a remedy by suit for damages for a failure by a water company to furnish water for fire purposes, according to its contract with a city, leaves the subject 'in an extremely unsatisfactory position,'" the court in this case reiterated the suggestion made in the annotator's note to *Britton v. Green Bay &c. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. 856, that "the only security would seem to be in legislation, or in the incorporation of some suitable provision in future contracts of this description, wherever the taxpayers desire to reserve a personal remedy against the water company'." The court in the course of its decision said: "The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so is that there is a want of privity between him and the defendant which disables him either from suing for a breach of the contract or for the breach of duty growing out of the contract. * * * It was furthermore shown that in the cases where an action had been sustained, when instituted by a third party upon a contract for his benefit, there had been a debt or duty owing by the promisee to the party claiming the right to sue upon the promise. It is not claimed that the city of Bessemer owed any duty to the plaintiff to furnish water for the extinguishment of fire, or that an action could have been maintained against the city for a failure in that regard. * * * It suffices for all practical purposes of this case to say that our own decisions, in which the opinions were written by as able judges as ever occupied this bench, and in which there was no dissent, have rested the conclusion in similar cases involving public contracts upon the declaration that there was a want of privity."

§ 322. No recovery not expressly provided for in contract.—In denying liability because it was not expressly provided for in the contract, which the court assumed indicated that the liability was not contemplated by the parties, it was held, in the case of *Niehaus Bros. Co. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045, that the payment made for water service only included water as a commodity and that the consideration would not be adequate to cover the liability for fire loss, the court saying: "While it is to be presumed that the rates established by a municipal ordinance are fair and reasonable, this presumption only applies as far as such rates fix the compensation to be paid the company for furnishing water to consumers as a commodity. They are not fixed as a consideration under which the company obligates itself to furnish water for the extinguishment of fires, with a corresponding liability for failure to do so. And it is from the fact that under the ordinary relation of public service corporation and consumer that the only duty of the company is to furnish water as a commodity, and not for the purpose of extinguishing fire, that liability for damages for failure to supply it for the latter purpose can only be created by express contract. * * * The authorities deny the liability, on the ground that there is no privity of contract between property owners and the water company."

That no recovery for fire loss is available to the individual consumer because it was not contemplated by the parties or covered by the consideration is the effect of the decision in *Dublin Elec. &c. Co. v. Thompson* (Tex. Civ. App.), 166 S. W. 113: "The fact that the company had contracted with the city for the purpose of furnishing water for fire purposes, and that the residences were provided with no facilities for that purpose, nor charged a rate commensurate with the risk thereby necessarily incurred, seems conclusive, in the absence of express words to the contrary, against the plaintiff's contention in this case. See *Niehaus Bros. Co. v. Water Co.*, by the Supreme Court of California, 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045, and cases therein cited."

§ 323. Acting in governmental capacity—No liability.—Because the municipality in providing water service for fire protection by way of contracting with a private corporation for water supply was regarded as acting in its governmental capacity for the general welfare and in the discharge of a purely public governmental duty for which it could not be held liable in any event, whether it attempted to perform the duty and failed or

did not even make the attempt, a private corporation undertaking to furnish the service in place of the municipality itself occupied the position enjoyed by the city and could not be held liable to the individual property owner sustaining a loss by fire due to a failure to provide water service in accordance with the contract, for as the court in the case of *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. 258, decided in 1894, said: "Under the statute the city had a right to enact an ordinance for protection against fire, but it was not bound to do so. In enacting the ordinance, the municipality moved in its governmental capacity, in the general interests of the community. As a means to obtain its object, the city contracted with the company for a water supply. The ordinance, therefore, in so far as the inhabitants of the city and public interests generally were concerned, was a governmental measure, which the city might take or not take, as seemed best; and no liability existed against the city for a failure to enact the ordinance, or for a failure to see that it was duly enforced. There could, then, be no public duty, under the ordinance, the violation of which would render the city, or those appointed to carry out the provisions of the ordinance, liable to any one who might suffer. * * * But, while the inhabitants were interested in the contract made for their benefit, we do not think that this interest was such as gave the inhabitants the right to sue for its enforcement, or for damages occasioned by a failure to enforce it. * * * There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community, and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire."

The right to recover for fire loss against a waterworks company under the Indiana law was again denied in the case of *Trustees of Jennie DePauw Memorial Methodist Episcopal Church v. New Albany Water Works*, 193 Ind. 368, 140 N. E. 540, 27 A. L. R. 1274, where the court said: "Under the common law as interpreted by this court, sustained by a formidable line of authorities, neither a municipality operating its own waterworks nor a privately owned water company serving a city and its inhabitants with water for domestic purposes and for the purpose

of extinguishing fires, is liable in damages to any individual for a loss from fire occasioned by the failure to obtain water from the fire hydrants to extinguish such fire. *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. 258. Appellant admits that there is no liability in its behalf under the common law, but bases its right of recovery upon sections 7 and 116 of the Public Service Commission Act (Acts 1913, p. 167, sections 10052g, 10052m, 4 Burns 1914). Section 7, *supra*, imposes the duty, and section 116, *supra*, merely gives a right of action. Twenty years prior to the enactment of the statute in question, this court had unmistakably declared the rule to be that a water company serving a city and its inhabitants with water for domestic purposes and for the purpose of extinguishing fires, was not liable to a private citizen although a taxpayer of the municipality, for a failure to supply water at the fire hydrant, by which failure such citizen suffered a loss. *Fitch v. Seymour Water Co.*, *supra*. The ruling by this court had been preceded by the same ruling by many courts of other states and by the English courts, and has since that time been supported by a great number of decisions of courts of last resort in support of that rule. It is of interest in the consideration of this question to note that but three states of the United States have adopted a rule contrary to the one above enunciated. The legislature of this state had before it, in unmistakable language in the opinion of this court, this rule of law, when it drafted and enacted section 7 of this act, *supra*; and it is reasonable to presume, having before it this rule of law, which has received the almost unanimous support of the courts of the English speaking world, that by so concisely stating the rule, it intended to limit the duty under it to establish judicial interpretation, and that, had it intended to enlarge its scope, it would have done so by undoubted and unmistakable language. And the court now is constrained to hold that, inasmuch as the first sentence of section 7, *supra*, merely declares what was the rule at common law and the rule in this state, it did not intend to vary the rule by the use of language so plain in stating the prior rule, for 'it will be presumed that the legislature does not intend by a statute to make any change in the common law beyond which it declares either in express terms or by unmistakable implication.' * * * The former contractual relationship was between appellee and the municipality alone, and appellee did not contract to give fire protection to any individual taxpayer within the municipality. So that it is necessary to hold under the Public Service Act that

appellee owed no contractual duty for such service to appellant. Appellant seeks to construe its own complaint to sound in tort, which involves the rule of law, that, to make appellee guilty of negligence against the appellant, it must have owed a duty to appellant, which duty it has violated. There having been no contractual relationship between the parties, and it now being held that the statute is merely declaratory of the common law, and that it does not impose a statutory duty upon appellee to render such service directly to appellant, its complaint has no standing as being delictual. Section 116, *supra*, merely gives a right of action. The right of action so given does not point solely to section 7, *supra*, but to many other sections of the act which specify duties to be performed as well as things which are prohibited. * * * Section 7, *supra*, of the act creates no duty upon appellee which will make it liable in damages to an individual citizen of the municipality for loss by fire, not imposed by common law, and section 116, *supra*, creates no right of action, in relation thereto, not heretofore recognized. The demurrer to the complaint was properly sustained."

To the same effect and for the same reason recovery is denied in the case of *Anderson v. Iron Mountain Waterworks*, 225 Mich. 574, 196 N. W. 357: "Had the city owned and operated the water system, plaintiff could have brought no suit against it for failure to keep the hydrants serviceable. At common law no such liability, as claimed here, has been imposed on a water company. * * * To constitute all the property owners of the city beneficiaries of the contract by implication of law, with right of action individually, is not permissible."

The general rule of the common law, denying liability to an owner of property for its loss by fire because of the negligence of a municipality, whose duty in furnishing such service is governmental rather than contractual, is well established. In most jurisdictions a contract by a private waterworks company with a municipality to furnish water for its fire department does not carry liability for the benefit of the individual sustaining a loss by fire, and the court of Indiana refused recovery for such damages against a privately owned waterworks company in the case of *Larimore v. Indianapolis Water Co.*, 197 Ind. 457, 151 N. E. 333, where the court said: "At common law a city or other municipal corporation is not liable to an owner of property within its corporate limits destroyed by fire, on account of negligence of the municipality and its officers in failing to provide suitable fire apparatus or an adequate supply of water with which

to extinguish the fires by which such property is consumed. * * * Nor is a water company liable at common law whose only obligation to furnish water with which to extinguish such fires arises out of a contract between it and the city that binds the company to supply the city with water for that purpose. *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. 258, supra; *Trustees, &c. v. New Albany Water Works*, 140 N. E. 540, 193 Ind. 368, 27 A. L. R. 1274. * * * This court held in a recent case that these sections of the statutes do not give any new right of action which did not exist at common law for the recovery of damages by reason of property within the city being suffered to burn for lack of adequate fire protection. After a careful review of the subject, we are satisfied with that decision, upon the authority of which this judgment must be affirmed. *Trustees, etc. v. New Albany Waterworks*, 140 N. E. 540, 193 Ind. 368, 27 A. L. R. 1274."

§ 324. **Waterworks company subrogated for municipality.**—The case of *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290, decided in 1903, held that, "a municipal corporation is not bound to furnish protection from fire, and that, when authorized so to do by legislative act, it has discretion to omit the exercise of that power, and there is no duty resting upon it which may form the basis of a contract between the corporation and the citizen who owns property. This is the position taken by the great majority of the courts which have passed upon the question. This principle governs also the relation of a private or quasi-public corporation toward the citizens and property owners of the city in which, under a contract with the city, it undertakes to furnish water for protection against fire, in consideration of the payment by the city of an annual rental."

This principle denying any liability is fully sustained and the reasons on which it is based are set out at length in the case of *Wallace v. Baltimore*, 123 Md. 638, 91 Atl. 687: "The liability of municipalities for injuries growing out of negligence in failure to supply water for the extinguishment of fires has never been before this court, but has been before the courts of other states in many cases, and in every instance, so far as our research discloses, with one exception, the liability of the municipality has been denied, and in that jurisdiction where the municipality was held liable (*Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341) the opposite conclusion was reached in two later decisions (*Butterworth v. Henrietta*, 25 Tex. Civ. App. 467, 61 S. W. 975; *Greenville Water Co. v. Beckham*, 55 Tex. Civ. App. 87,

118 S. W. 889). It is seen from the averments of the narr. that there is not involved in this case the question of liability of the appellee for its failure to furnish water to the appellant for which he was paying rental, but only its failure to furnish water to the fire department for its use in extinguishing a fire. * * * In determining municipal liability for injuries due to negligence in the operation of waterworks, courts have generally viewed the subject in a two-fold aspect, due to the fact that a municipal corporation, in maintaining waterworks, not only sells water to its inhabitants for domestic purposes, in the performance of which function it is practically always held to be acting in a private corporate capacity and for its own benefit, but also gratuitously furnishes water to be used in extinguishing fires, in the performance of which duty it is acting in a public governmental capacity. *Taintor v. Worchester*, 123 Mass. 311, 25 Am. Rep. 90; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 664; *Springfield Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. 667; *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. 256; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. 533; *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770. Indeed, so practically unanimous have been the decisions denying the liability of the municipality for losses from fire through the alleged negligence in connection with the waterworks that it is impracticable to give all of the authorities so holding, but for further authorities reference is made to the full notes and citations on the question in 61 L. R. A. 95, and 25 L. R. A. (N. S.) 239. We are unable to discover anything in the charter provisions of the appellee or in any of the Maryland authorities which render inapplicable the overwhelming opinion on this subject."

§ 325. **Recovery denied, although expressly stipulated by contract.**—In the case of *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kans. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. 267, decided in 1892, the defendant water company, in accordance with the ordinance, undertook "that it would pay all damages that might accrue to any citizen of the city by reason of a failure on the part of defendant to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the defendant." In spite of this express undertaking the court decided that as the city is not liable for the failure of the company to furnish an adequate water service or for the performance of the conditions of the contract, the water

company is not liable on such a contract to an individual for the contract is between the city and the water company. This decision furnishes a striking illustration of a contract upon which no recovery can be had by the municipality which is a party to it because its property is not destroyed, nor by the customer and individual property owner who pays for water service and whose property is destroyed, which contract was entered into by parties competent to make it and for a valid consideration, which expressly provides for the supplying of a sufficient amount of water and for a liability for the failure to furnish such a supply. In the course of its decision the court said: "Under the powers conferred by the statute upon cities in this state a city making a contract with a water company to furnish water for fires, etc., is not liable to its citizens or residents on account of the failure of the company to furnish water or to perform the conditions of the contract. If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between it and the city. The contract, in such a case, is between the city and the water company only. * * * This action is not based upon a breach of a statutory duty, but upon the failure of the water and manufacturing company to comply with a contract made with the city of Ottawa."

§ 326. **No recovery contemplated in fixing rates.**—The case of *Lutz v. Tahlequah Water Co.*, 29 Okla. 171, 118 Pac. 128, 36 L. R. A. (N. S.) 568, decided in 1911, refused recovery for the equitable reason stated that the large investment necessary to establish a water plant had been made with the understanding, from the majority of the cases, that it would not be subjected to this liability. Nor is this an unreasonable application of the doctrine of *stare decisis*, which, while most frequently applied to the law affecting title to real estate and for the purpose of protecting and conserving vested interests, is also fairly applicable to the case in point for when such an investment has been made on this understanding of the principle and the rates for the service have been fixed without including this liability as an obligation in connection with the service, it would obviously be a hardship and the taking of an unfair advantage to subject the company to such liability, for as the court in its opinion observed: "From the foregoing it will be seen that we are unable to concur with the counsel in his strictures upon following the weight of authority in this case. Nor in so doing do we feel that an injustice is being done the litigants, but rather that the contract made and the obligations created by the law, which existed

before and at the time of the occurrence out of which this controversy has arisen, are being observed and carried out. When the water company came to establish itself at Tahlequah, and when the parties invested their funds therein and took upon themselves the burdens involved, it must be assumed from the character of the project and the large investment necessarily involved that they were aware that the great weight of judicial opinion in the United States was that, in the event of a failure on the part of the company to supply water on the occasion of the destruction of some taxpayer's property, that it would not be liable to him for the damages. * * * In following in this case, as we do, that which is the settled judgment of very nearly all courts of last resort, English, federal, and state, we do so with the abiding conviction that it is the law, and is correctly declared."

§ 327. **Impracticable to permit recovery.**—This point is brought out to better advantage in the reasoning of the court in the case of *Ancrum v. Camden Water, Light &c. Co.*, 82 S. Car. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029, decided in 1909, where the court held that the liabilities of the parties are limited by the express terms of the contract; and as the defendant company did not contract expressly to pay the losses by fire, although they might have been prevented if it had not neglected to furnish an adequate supply of water, it was accordingly not liable for such losses, for as the court said: "There is, at least, a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue. * * * That a water company, assuming such liabilities, would have to demand very large compensation to have any profit, or even to save itself from bankruptcy, is most obvious. When it is asserted that a city has undertaken to pay for such indemnity to its individual inhabitants, and that the water company has assumed it, the contract relied on ought to show clearly that such payment by the city and indemnity by the water company were intended. The contract now under consideration contains no direct undertaking to respond to the individual inhabitant for fire loss."

§ 328. **Liability would require prohibitive rates.**—Because the liability for loss by fire would be so great a burden to the corporation undertaking to furnish water service that it would make the rates for such service for its ordinary use as a commodity excessive and to many prohibitive, the court, in the case of *Hone v. Presque Isle Water Co.*, 104 Maine 217, 71 Atl. 769, 21

L. R. A. (N. S.) 1021, decided in 1908, refused to permit recovery on such a liability, and said: "If now, instead of maintaining a system of waterworks of its own for the purpose of supplying water for the extinguishment of fires, a municipal corporation contracts with a water company to furnish water for that purpose, the numerous decisions of the courts of last resort in other states and in the federal courts, as before indicated, are practically unanimous in holding that the water company is not liable to the individual owner of property which has been destroyed by fire by reason of the company's failure to furnish an adequate supply of water to extinguish fires. * * * But the proposition advanced by the plaintiffs would require water companies to assume, to some extent, the responsibility of insurers; and it does not satisfactorily appear that such a doctrine would be more in harmony with considerations of public policy, or more consonant with reason and justice, than the established rule. Ample opportunities are already afforded for all property owners to obtain insurance against losses by fire, and the assumption of such risks by water companies, even in a modified degree, would result in double insurance, and largely increase water rates."

§ 329. **Contract only with municipality to furnish water for fire protection.**—The court, in the case of *Britton v. Green Bay &c. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. 856, decided in 1892, refused recovery in a similar case because there was no contractual relation between the parties, and as the municipality could not be held liable on a similar undertaking, the corporation agreeing to render service under a contract with the municipality is not liable, for the duty to furnish fire protection still remained with the municipality and could not be shifted, and the only liability of the water company under its contract was with the city, for as the court said: "It is not that the company shall supply the city and the inhabitants thereof with water jointly and for the same purposes and uses. The city and the inhabitants are by this general language joined together, but it is followed by distributive uses and purposes appropriate to each—to the city for public uses and consumption and for putting out fires, and to the inhabitants for private use and consumption. * * * This is in accordance with the gravamen of the complaint, that the defendant company neglected to furnish the city water to put out the fire that consumed the plaintiff's property, and that the fire department of said city would have extinguished and prevented the spread of the fire but for the negligence and carelessness of the defendant. It is too plain for argument that

the plaintiff has no contractual relations with the defendant in respect to being supplied with water to be used in putting out this fire. * * * This court has held that the city itself would not be liable in such case, even on the strength of its duty to the public.⁵ Could the defendant have reasonably supposed that by this contract with the city it was contracting with or incurring liability to each one of its inhabitants, and that it might be sued by each one individually and separately? If one enters into a contract with another, must he look to see who else might possibly in some way be remotely interested in it and injured by its breach? There would be no end to such a liability. * * * Is it a hardship that the plaintiff can not recover in such a case? So it is in case the city is sued for the neglect of its duty in not furnishing the necessary machinery for putting out fires. It is no greater hardship in one case than in the other. The duty of furnishing water and using it to put out fires still remains in the city. That duty has not been, if it could be, transferred to the company. The company is bound only by its contract, and liable to the city alone, as the other contracting party, on the contract."

§ 330. Express contract for water service for fire protection necessary.—The court in the case of *Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. 107, decided in 1904, recognized that where the corporation contracted expressly for the furnishing of water service for fire protection either with an individual property owner or the municipality itself, it would be held liable for failure to furnish such service where this resulted in a fire loss, but held, however, that a contract must expressly provide for this service, the court saying: "Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire by reason of its failure to furnish him a sufficient supply of water."⁶ * * * It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual; but it certainly needs something more than evidence

⁵ *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760.

⁶ See *New Orleans &c. R. Co. v. Meridian Water Works Co.*, 72 Fed. 227; *Paducah Lbr. Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12

S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. 536; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467.

showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more."

The court, in denying liability for fire loss for the failure to furnish water, because the company's duty was to furnish water as a commodity and not for the express purpose of putting out fires, unless it expressly contracted to do this, stated the rule as follows in the case of *Luning Mineral Products Co. v. East Bay Water Co.*, 70 Cal. App. 94, 232 Pac. 721: "The plaintiff Luning Mineral Products Company joined with the London Assurance Corporation in an action against the East Bay Water Company to recover damages for the loss of the plant of the first-named plaintiff, which was destroyed by fire. A demurrer to the complaint was sustained. * * * Notwithstanding this, the Supreme Court held that this service, termed 'stand-by service,' a charge for the supply of water to the fire hydrants in case of fire, did not fix upon the public utility a corresponding liability for failure to furnish water for the extinguishment of fires, the court saying that the duty of the public utility was to furnish water as a commodity and not for any particular purpose such as the extinguishment of fires, unless an express contract for that purpose has been made. Here the only contract whereby the public utility obligated itself to furnish water for fire protection was the contract with the city in which the appellant was interested as a taxpayer only. * * * In accord with the rule of the foregoing cases, the judgment is affirmed."

§ 331. **Rate for service indicates no liability for fire loss contemplated.**—Another practical application of this rule based on the reason that such a liability was not contemplated by the parties in making the contract is furnished by the case of *Milford v. Bangor R. & Electric Co.*, 106 Maine 316, 76 Atl. 696, 30 L. R. A. (N. S.) 526, 20 Ann. Cas. 622, decided in 1909, where the court refused to sustain the liability in favor of the municipality for loss of its own property by saying: "It certainly can not be reasonably claimed that, for the moderate consideration received by a water company under such a contract as the one actually made in the case at bar, it was within the contemplation of both parties that the water company had undertaken to make good the loss which would result from the destruction of the plaintiffs' property by fire. It is the opinion of the court that the legal effect of the contract in this case can not be distinguished in any essential particular from that considered in *Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. 107, supra, and that

the verdict of the jury in this case, being against the law, can not be sustained."

This same court, however, in a former opinion in the case of *Milford v. Bangor R. & Electric Co.*, 104 Maine 233, 71 Atl. 759, 30 L. R. A. (N. S.) 531, decided in 1908, said: "But the demurrer admits the truth of the plaintiffs' allegations that the defendant 'wrongfully, carelessly and negligently suffered and allowed the mains, pipes, and hydrants to be destitute of any current of water of sufficient pressure, force, and volume to be of any value or utility in extinguishing said fire, or any fire.' And the plaintiffs aver that the 'sole cause of the said loss and damage was the wrongful neglect of duty of said defendant.' * * * The conclusion is irresistible that, upon proof of the facts stated in the declaration, the defendant would be liable to the plaintiffs, in an appropriate action, for the damages caused by its negligence, in failing to perform a duty arising from its contractual relations with the plaintiffs."

§ 332. **Interest of taxpayer and consumer in contract only incidental.**—One of the strongest expressions of the rule denying recovery to an insurance company which, having paid the loss, wished to be subrogated to the owner, in an action for damages due to a fire loss, against the waterworks company for its failure to furnish an adequate water supply, is furnished in *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 57 L. ed. 195, 33 Sup. Ct. 32, 42 L. R. A. (N. S.) 1000, decided in 1912, where the court said: "From them it appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements, and therefore can not sue *ex contractu*. Neither can he sue in tort, because in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto*. A different conclusion is reached by the Supreme Courts of three states, in cases cited and discussed in *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. 207. They hold that such a contract is for the benefit of taxpayers, who may sue either for its breach, or for a violation of the public duty which was thereby assumed. * * * Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which

each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.”

§ 333. **Recovery only by party to contract expressly stipulated.**—Where the contract, however, is made directly with the party suffering the loss from fire due to an inadequate water service, and where it expressly covers liability for such loss, and is not merely an agreement in general terms to furnish water for general fire purposes, there may be recovery for such loss by the party sustaining it, whether an individual inhabitant or the municipality itself, because the parties to the agreement intended their contract to cover such a liability. In the case of *Galena v. Galena Water Co.*, 132 Ill. App. 332, the action was brought by the municipality and the school directors of a school district within the municipality to recover damages for the loss from fire sustained by the school building, due to a negligent breach of the contract by the defendant to furnish proper water protection. The second section of the ordinance providing for the water supply from the defendant company to the municipality and its inhabitants provided that “the water supplied by said works shall be good, clear water, of sufficient quantity for all domestic, fire and manufacturing purposes within said city and suitable for those purposes,” and a later section specifically provided for the pressure and capacity of the service and for the erection of a water standpipe and other fixtures necessary to secure such pressure as a protection against loss by fire. It was alleged in the case that the protection from fire loss furnished by the fire department was adequate, but that the fire could not be extinguished because of the failure of the defendant to furnish a sufficient supply of water for that purpose in accordance with the provision of its undertaking as stipulated in the ordinance. In the course of its opinion the court observed: “If, as alleged in the declaration, the water company failed to perform these provisions of the contract, and if that failure caused a loss by fire to property owned by the city, we see no good reason why the water company should not be responsible to the city, one of the parties to the contract, for the proximate results of such breach of contract.”

In this case on appeal to the Supreme Court of Illinois, as affirmed in 229 Ill. 128, 82 N. E. 421, decided in 1907, the court

observed that: "Only one state, California,⁷ has passed upon the right of a city to maintain an action against a private party or corporation with whom it has contracted for the construction and operation of waterworks for the city and its inhabitants, to recover of the water company for a destruction of the city's property caused by a failure of the water company to furnish a sufficient supply of water." The court, however, did not decide the case on its merits for the reason that there was a misjoinder of the municipality and the school directors, it appearing that the title to the building was owned by the municipality and only controlled and managed by the school directors, who were accordingly improperly joined as parties plaintiff in the case.

The general rule of nonliability is summarized in the case of *Ellis v. Birmingham Waterworks Co.*, 187 Ala. 552, 65 So. 805: "The great weight of authority denies the right of a property owner to maintain an action against a water company for loss of property proximately resulting from its failure to provide sufficient water or water pressure for fire purposes, as is required by its contract with the municipality. The right of action, however, has been upheld by the courts of North Carolina, Kentucky, and Florida, but that the weight of authority is against this holding has been acknowledged by some of these courts. The courts in line with this court, holding that there is no liability, base the holding upon a want of privity between the property owner and taxpayer, and the defendant water company, and that this want of privity prevents the owner from bringing an action, either for breach of contract or for breach of a duty growing out of the contract."

§ 334. **Insurance payment.**—While admitting a right to recover under a contract expressly so providing, recovery was denied because restitution by payment had been made through the insurance company, in the case of *Warren Co. v. Hanson*, 17 Ariz. 252, 150 Pac. 238, where the court said: "If the contract was made so as to become binding, and if the defendant has failed to substantially perform as promised, and plaintiff suffered a loss from such failure, he is entitled to recover, not because defendant was an insurer and liable as such, but because defendant is guilty of a breach of his contract. Upon no other theory under the pleadings can plaintiff recover. * * * The amount of insurance recovered is, in effect a replacing by the insurance company of the property to the actual value of the net sum recovered.

⁷ *Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. 107.

Such property so insured was not under the protection of the contract with defendant, because that property so covered by insurance to the value recovered was not a loss to plaintiff, and therefore, as he has received compensation for such property, he can not recover its value from defendant; otherwise he could recover double compensation, which the law does not permit in such cases."

CHAPTER 15

NEGLIGENCE OF MUNICIPAL PUBLIC UTILITIES

Section	Section
340. General liability for negligence.	347. Municipality liable for damage from defective pipes.
341. Municipality liable for negligence except where act governmental.	348. Municipality liable for waterworks same as for streets.
342. Municipality not liable in providing fire protection.	349. No liability under statute where duty partly governmental.
343. Municipality liable in furnishing water privately.	350. No liability for public duty which is not commercial enterprise.
344. Two capacities of municipal corporations.	351. Liability for negligent maintenance of waterworks property.
345. Liability under municipal ownership.	352. Liable only for ordinary use of water.
346. Liability under commission.	

§ 340. **General liability for negligence.**—With the exception of that class of cases concerned with the furnishing of a water supply for protection against fire loss, which is discussed in the preceding chapter, corporations providing municipal public utility service, including municipal corporations, are liable for injuries sustained from negligence in connection with the ownership and the operation of their plant in furnishing such service; and all such corporations, including municipalities, are liable for their negligence to the same extent and for the same reason that any individual or corporation is liable for injuries resulting from negligence, except in those cases where the municipal corporation acts in its public governmental capacity. This distinction between the liability of a municipal corporation, while acting in its public or governmental capacity on the one hand, and in its private, proprietary and commercial capacity on the other, which was discussed at the beginning of this treatise, must be kept in mind in this connection, in order to determine the nature and the extent of the liability of the municipality for negligence.

This general rule of liability for negligence of municipal public utilities, whether publicly or privately owned and operated, is generally the same as in other cases of negligence, as was

clearly indicated in the case of *Coy v. Columbus, Delaware &c. Electric Co.* (Ohio), 181 N. E. 131, where the court said: "The instant petition alleged the maintenance of an electrical transformer in active operation containing a powerful and dangerous electric current, situated upon premises frequented by children, together with the allegation that the company knew that children often congregated upon such premises. Therefore, within the doctrine of the *Ziehm* case, 98 Ohio St. 306, 120 N. E. 702, both knowledge of the probable presence of the infant and the employment of the active force which caused the injury were alleged. As set forth in the petition, this is not a case of a mere visible dangerous statical condition of the premises. This is a case of alleged negligent operation of a highly powerful and dangerous unit of electrical machinery upon premises where, with knowledge of the continuous presence of minors, for several years the company operating the electrical unit had permitted the fence protecting the machinery to become rotten and out of repair."

§ 341. **Municipality liable for negligence except where act governmental.**—In the preservation of the public peace, the administration of justice, in attending to the public health and education and in providing protection against fire, the municipality acts as an agent of the state in the exercise of its public, governmental power and is subject to the absolute control of the state, and is not liable for injuries or loss sustained, resulting from its negligence in the performance of such duties or for its failure to perform them. In the erection and operation of gas works, waterworks, electric light plants—in fact, in the providing of any municipal public utility service for the special benefit and advantage of the municipality and its citizens, the municipal corporation acts as a business concern and is liable in the same way and to the same extent as a private individual or corporation in rendering such service. While the question of the liability of municipal corporations for the negligent operation of their municipal public utility plants when carried on for profit may not have been directly decided in a great number of cases, it is well established that in the ownership and operation of such systems and in the providing of their service for the individual inhabitants as well as for municipal purposes, the municipality is not performing a public governmental duty, but is acting in its private business capacity in the carrying on of a business enterprise for the benefit of its inhabitants and for profit and service

to itself, and is subject to the same liability as a private undertaking organized for the purpose.¹

¹ Federal. Guardian Trust & Co. v. Greensboro Water Supply Co., 115 Fed. 184, *affd.* in Guardian Trust & Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 186; Winona, Minnesota v. Botzet, 169 Fed. 321, 23 L. R. A. (N. S.) 204; Bristol Gas & Co. v. Deckard, 10 Fed. (2d) 66; Tillman v. District of Columbia, 29 Fed. (2d) 442; Hall v. Jackson, Mississippi, 30 Fed. (2d) 935; National Lead Co. v. New York, New York, 43 Fed. (2d) 914.

Alabama. Alabama Power Co. v. Farr, 214 Ala. 530, 108 So. 373; Compton v. Alabama Power Co., 216 Ala. 558, 114 So. 46, P. U. R. 1928A, 724; Stroup v. Alabama Power Co., 216 Ala. 290, 113 So. 18.

California. San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Yik Hon v. Spring Valley Water Works, 65 Cal. 619, 4 Pac. 666; Anderson v. Southern California Edison Co., 77 Cal. 328, 246 Pac. 559; Davoust v. Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 Pac. 544; Kruger v. California Highway Indemnity Exchange (Cal.), 258 Pac. 602; Morrison v. Smith Bros. (Cal.), 293 Pac. 53; Sincerney v. Los Angeles, 53 Cal. App. 440, 200 Pac. 380; Rosander v. Market R. Co., 89 Cal. App. 721, 265 Pac. 541; Howell v. San Joaquin Light & Co. Corp. (Cal. App.), 261 Pac. 1107.

Colorado. Cardiff Light & Co. v. Taylor, 73 Colo. 566, 216 Pac. 711; Public Service Co. v. Williams, 84 Colo. 342, 270 Pac. 659.

Connecticut. Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487; Judson v. Winsted, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; Hayes v. Torrington Water Co., 88 Conn. 609, 92 Atl. 406.

Georgia. Brown v. Atlanta, 66 Ga. 71; Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. 64; Augusta v. Mackey, 113 Ga. 64, 38 S. E. 239; Freeman v. Macon Gas Light & Co., 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917; Newton v. Moultrie (Ga.), 148 S. E. 299; Milam v. Mandeville Mills, 41 Ga. App. 62, 151 S. E. 672; South Georgia Power Co. v. Smith, 42 Ga. App. 100, 155 S. E. 80.

Idaho. Eaton v. Weiser, 12 Idaho 544, 86 Pac. 541, 118 Am. St. 225.

Illinois. Chicago v. Selz & Co., 202 Ill. 545, 67 N. E. 386; Palestine v. Siler, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; Pennsylvania R. Co. v. Lincoln Trust Co. (Ill.), 167 N. E. 721.

Indiana. Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. 258; Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Ft. Wayne v. Christie, 156 Ind. 172, 59 N. E. 385; Aiken v. Columbus, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416; Trustees of Jennie Depauw Memorial M. E. Church v. New Albany Waterworks, 193 Ind. 368, 140 N. E. 540, 27 A. L. R. 1274; Larimore v. Indianapolis Water Co., 197 Ind. 457, 151 N. E. 333; Ft. Wayne v. Patterson, 25 Ind. App. 547, 58 N. E. 747; Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279; Huntington v. Morgen, 90 Ind. App. 573, 162 N. E. 265, 163 N. E. 599.

Iowa. Bennett v. Mt. Vernon, 124 Iowa 537, 100 N. W. 349; Miller Grocery Co. v. Des Moines, 195 Iowa 1310, 192 N. W. 306, 28 A. L. R. 815; Beman v. Iowa Elec. Co., 205 Iowa 730, 218 N. W. 343.

Kansas. Topeka Water Co. v. Whiting, 58 Kans. 639, 50 Pac. 877, 39 L. R. A. 90.

Kentucky. Owensboro v. Knox, 116 Ky. 451, 25 Ky. L. 680, 76 S. W. 191; Henderson v. Young, 119 Ky. 224, 26 Ky. L. 1152, 83 S. W. 583; Terrell v. Louisville Water Co., 127 Ky. 77, 105 S. W. 100; Efutmus v. Newport, 175 Ky. 817, 194 S. W. 1039; Phillips v. Kentucky Utilities Co., 206 Ky. 151, 266 S. W. 1064;

Danville v. Vanarsdale (Ky.), 48 S. W. (2d) 5.

Louisiana. Waguespack v. Flateau, 157 La. 1, 101 So. 725.

Maine. Butler v. Bangor, 67 Maine 385.

Massachusetts. Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Hand v. Brookline, 126 Mass. 324; Griffin v. Lawrence, 135 Mass. 365; Stock v. Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. 430; Aldworth v. Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. 608; Connolly v. Waltham, 156 Mass. 368, 31 N. E. 302; Stoddard v. Winchester, 157 Mass. 567, 32 N. E. 948; Watson v. Neeham, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287; Powers v. Fall River, 168 Mass. 60, 46 N. E. 408; Sheehan v. Boston, 171 Mass. 296, 50 N. E. 543; Fox v. Chelsea, 171 Mass. 297, 50 N. E. 622; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; St. Germain v. Fall River, 177 Mass. 550, 59 N. E. 447; Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; Haley v. Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005; Pearl v. Revere, 219 Mass. 604, 107 N. E. 417.

Michigan. Miller v. Kalamazoo, 140 Mich. 494, 103 N. W. 845; Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430; Sykes v. Portland, 177 Mich. 290, 143 N. W. 326; Anderson v. Iron Mountain Water Works, 225 Mich. 574, 196 N. W. 357; Mueller Furniture Co. v. Citizens Tel. Co., 230 Mich. 173, 203 N. W. 129.

Minnesota. Eisenmenger v. Board of Water Comrs., 44 Minn. 457, 47 N. W. 156; Megins v. Duluth, 97 Minn. 23, 106 N. W. 89; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076; Zamani v. Otter Tail Power Co., 182 Minn. 355, 234 N. W. 457.

Mississippi. Yazoo City v. Birchett, 89 Miss. 700, 42 So. 569; Jackson v. Anderson, 97 Miss. 1, 51 So. 896; Mississippi Power Co. v. Byrd (Miss.), 133 So. 193.

Missouri. Dammann v. St. Louis,

152 Mo. 186, 53 S. W. 932; Rice v. St. Louis, 165 Mo. 636, 65 S. W. 1002; Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045; Carey v. Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65; Bowers v. Kansas City Public Service Co. (Mo.), 41 S. W. (2d) 810; Rose v. Missouri Dist. Tel. Co. (Mo.), 43 S. W. (2d) 562; Bullmaster v. St. Joseph, 70 Mo. App. 60; Boothe v. Fulton, 85 Mo. App. 19; Burnes v. St. Joseph, 91 Mo. App. 489; Sanders v. Carthage (Mo. App.), 9 S. W. (2d) 813, revd. and remanded in 51 S. W. (2d) 529, because of errors in the instructions to the jury, and on the evidence.

Nebraska. Reed v. Syracuse, 83 Nebr. 713, 120 N. W. 180; Van Horn v. Ericson Lake Co., 113 Nebr. 332, 203 N. W. 553; Cook v. Beatrice, 114 Nebr. 305, 207 N. W. 518.

New Hampshire. Grimes v. Keene, 52 N. H. 330; Edgerly v. Concord, 62 N. H. 8, 13 Am. Rep. 533; Gross v. Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. 586; Lockwood v. Dover, 73 N. H. 209, 61 Atl. 32; Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. 604.

New Jersey. Jones v. Mt. Holly Water Co., 87 N. J. L. 106, 93 Atl. 860.

New York. New York v. Bailey, 2 Denio (N. Y.) 433; Maxmillian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Brusso v. Buffalo, 90 N. Y. 679; Seward v. Rochester, 109 N. Y. 166, 16 N. E. 348; Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. 442; Morton v. New York, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241; Missano v. New York, 160 N. Y. 123, 54 N. E. 744; In re Board of Rapid Transit R. Comrs., 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366; Oakes Mfg. Co. v. New York, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N. S.) 286, rearg. denied in 206 N. Y. 749, 100 N. E. 414; Quill v. New York, 36 App. Div. 476, 55 N. Y. S. 889; Dunstan v. New York, 91 App. Div. 355, 86 N. Y. S.

562; *Southeast v. New York*, 96 App. Div. 598, 89 N. Y. S. 630; *Kelsey v. New York*, 123 App. Div. 381, 107 N. Y. S. 1089; *Messersmith v. Buffalo*, 138 App. Div. 427, 122 N. Y. S. 918; *Powers v. Mechanicville*, 163 App. Div. 138, 148 N. Y. S. 452; *McAvoy v. New York*, 54 How. Prac. 245, 122 N. Y. S. 918; *Terry v. New York*, 8 Bosw. (N. Y.) 504; *Ettlinger v. New York*, 58 Misc. 229, 109 N. Y. S. 44; *Van Alstyne v. Amsterdam*, 119 Misc. 817, 197 N. Y. S. 570; *Wannamaker v. Rochester*, 44 N. Y. St. 45, 17 N. Y. S. 321.

North Carolina. *Mitchell v. Raleigh Elec. Co.*, 129 N. Car. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. 735; *Fisher v. New Bern*, 140 N. Car. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. 857; *Mabe v. Winston-Salem*, 190 N. Car. 486, 130 S. E. 169; *Pleasants v. Greensboro*, 192 N. Car. 820, 135 S. E. 321.

Ohio. *Ironton v. Kelley*, 38 Ohio St. 50; *Coy v. Columbus, Delaware & C. Elec. Co. (Ohio)*, 181 N. E. 131.

Oklahoma. *Norman v. Ince*, 8 Okla. 412, 58 Pac. 632.

Oregon. *Esberg Cigar Co. v. Portland*, 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 435, 25 Am. St. 651; *Blake-McFall Co. v. Portland*, 68 Ore. 126, 135 Pac. 873; *Coleman v. La Grande*, 73 Ore. 521, 144 Pac. 468; *Mollencop v. Salem (Ore.)*, 8 Pac. (2d) 783.

Pennsylvania. *Western Savings Fund Society v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Smith v. Philadelphia*, 81 Pa. 38, 22 Am. Rep. 731; *Baker v. North East*, 151 Pa. 234, 24 Atl. 1079; *Glase v. Philadelphia*, 169 Pa. 489, 32 Atl. 600; *Rumsey v. Philadelphia*, 171 Pa. 63, 32 Atl. 1133.

Rhode Island. *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

South Carolina. *Irvine v. Greenwood*, 89 S. Car. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363; *Sanders v. Charleston Consol. R. & C. Co.*, 159 S. Car. 266, 156 S. E. 874.

South Dakota. *Wilson v. Mitchell*, 17 S. Dak. 515, 97 N. W. 741, 65 L. R. A. 168, 106 Am. St. 784; *Roster*

v. Inter-State Power Co. (S. Dak.), 237 N. W. 738.

Texas. *Barnhart v. Hidalgo County Water Improvement Dist. No. 4 (Tex.)*, 278 S. W. 499; *Holderbaum v. Hidalgo County Water Imp. Dist. No. 2 (Tex. Civ. App.)*, 297 S. W. 865; *Cameron County Water Imp. Dist. No. 1 v. Whittington (Tex. Civ. App.)*, 297 S. W. 868; *Boyle v. Pure Oil Co. (Tex.)*, 16 S. W. (2d) 146; *Willis v. Neches Canal Co. (Tex.)*, 16 S. W. (2d) 266; *West Texas Utilities Co. v. Haynes (Tex.)*, 20 S. W. (2d) 236; *Wichita County Water Imp. Dist. No. 1 v. McGrath (Tex. Civ. App.)*, 31 S. W. (2d) 457; *Dallas R. & Terminal Co. v. Banks-ton (Tex.)*, 33 S. W. (2d) 500; *Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. 702; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341; *Paris v. Tucker (Tex. Civ. App.)*, 93 S. W. 233; *El Paso Elec. Co. v. Leeper (Tex. Civ. App.)*, 42 S. W. (2d) 863.

Utah. *Levy v. Salt Lake City*, 3 Utah 63, 1 Pac. 160; *Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 14 Ann. Cas. 1004.

Vermont. *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735; *Bragg v. Rutland*, 70 Vt. 606, 41 Atl. 578; *Stockwell v. Rutland*, 75 Vt. 76, 53 Atl. 132.

Virginia. *Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 138 S. E. 503.

Washington. *Collensworth v. New Whatcom*, 16 Wash. 224, 17 Pac. 439; *Fidelity & C. Co. v. Seattle*, 16 Wash. 445, 47 Pac. 963; *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N. S.) 331; *Senske v. Washington Gas & C. Co. (Wash.)*, 4 Pac. (2d) 523.

West Virginia. *Wigal v. Parkersburg*, 74 W. Va. 25, 81 S. E. 554, 52 L. R. A. (N. S.) 465; *Groff v. Charleston-Dunbar Nat. Gas Co. (W. Va.)*, 156 S. E. 881.

Wisconsin. *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Piper v. Madison*, 140 Wis. 311, 122 N. W.

As stated by the court in the case of *Yazoo City v. Birchett*, 89 Miss. 700, 42 So. 569: "When a city embarks in the management of any utility for profit, it is liable, or not liable, by precisely the same rules applicable to private corporations or individuals conducting such enterprises."

§ 342. **Municipality not liable in providing fire protection.**—The distinction which it is necessary to make in determining the liability of the municipality in this connection between the two capacities of municipal corporations is well pointed out in the case of *Terrell v. Louisville Water Co.*, 127 Ky. 77, 105 S. W. 100, decided in 1907, where the court, in holding that the furnishing of fire protection only and the operation of its fire department is the discharge of a public governmental duty for which the municipality is not liable in damages in case of negligence, said: "In furnishing to its citizens fire protection, the city is discharging a governmental function. It is well settled that the city is not responsible in damages for the negligence of its firemen. The same principle must apply to the other agencies employed by the city as part of its fire department. The city is not responsible to a property owner if one of its fire engines is by negligence allowed to get out of repair, and by this means his property is lost. The thing that was out of repair here was a valve at one place, and at another the top of the cistern was so covered up with snow and ice that it took the firemen some ten minutes to locate and open it. In building these cisterns the city acted in a governmental capacity, and it is no more liable to the property owner for their being out of order than it would be if the fire chief had been negligent in responding promptly to the alarm, or in his efforts to put out the fire after he arrived on the scene."

A municipal corporation is not liable for the negligence of its servants in the discharge of governmental duties in the operation of its waterworks plant when furnishing water for the extinguishing of fires, especially in the matter of furnishing free water for a purpose beyond its authority and the scope of

780, 25 L. R. A. (N. S.) 239, 133 Am. St. 1078; *State Journal Printing Co. v. Madison*, 148 Wis. 396, 134 N. W. 909; *Highway Trailers Co. v. Janesville Elec. Co.*, 187 Wis. 161, 204 N. W. 773; *Waukesha Gas & Co. v. Waukesha Motor Co.*, 190 Wis. 462, 209 N. W. 590; *Chicago, St. Paul, Minneapolis & C. R. Co. v.*

Black River Falls, 193 Wis. 579, 214 N. W. 451; *Krier Preserving Co. v. West Bend Heating & C. Co.*, 198 Wis. 595, 225 N. W. 200.

Wyoming. *Seaman v. Big Horn Canal Assn.*, 29 Wyo. 391, 213 Pac. 938; *Miller v. New York Oil Co.*, 34 Wyo. 272, 243 Pac. 118.

its duties. Liability is generally denied in such cases because the agent or servant is acting beyond his scope of authority, and because the duty is governmental. An interesting discussion of this well-established principle is furnished in the recent case, from this same jurisdiction, of *Danville v. Vanarsdale* (Ky.), 48 S. W. (2d) 5, where the court said: "It is conceded that the law in this jurisdiction, as well as in some of the other states, is that, since municipalities and other local governmental agencies perform governmental duties within their territorial limits, they are not liable for negligence in the discharge of governmental functions within their jurisdiction, except in the one instance of maintaining the public streets, sidewalks, and ways in reasonably safe condition for travel, and that for a failure to do so they must respond in damages to the one sustaining them by reason of such failure. * * * As hereinbefore indicated, perhaps a majority of courts, upon apparent sound reasoning, disallow liability of the municipality under the exception to the general rule denying liability for negligence in the performance of governmental functions, and such reasoning is upon the general principle that there is no greater reason for the exception in the case of the maintenance of streets and public ways than for the exception to prevail and liability attach for negligence in the discharge of any other public or strictly governmental function. On the contrary, such courts reason that the public policy denying liability of municipalities for negligence in the performance of governmental functions intrusted to their local jurisdictions does not call for an exception in the case of streets and sidewalks or other public ways, and that to uphold liability followed by the financial obligations imposed thereby creates the necessity for burdensome taxation to be followed by consequences more objectionable than would result from a disallowance of liability in such excepted cases. Such reasoning can not fail to have the effect of admonishing us that the present limitation of liability in such cases should not be extended, but rather should be confined to those heretofore placed upon it. * * *

The manager or acting superintendent of defendant in this case, as well as the employee who actually put the fire hose across the walk at the place where plaintiff was injured, were acting outside of any duty to the city in the management of its waterworks plant either expressly given or within the scope of their employment. The only functions to be performed by the construction and operation of the city waterworks plant were (x) the furnishing of water for the extinguishment of fires, and (y) furnishing

to citizens and patrons water for domestic and other purposes for which compensation at regular rates was charged. The gratuitous furnishing of free water for the proved undertaking in this case by the purely accommodating and voluntary actions of such agent and employee, as well as all acts of theirs looking to the accomplishment of that purpose, including means and methods, was outside of and beyond their authority, and to hold the city liable for all consequences resulting therefrom would be a most dangerous rule to engraft on the present limitations of municipal liability in such cases. As well might the city be held liable for consequences growing out of a voluntary and gratuitous effort on the part of such agents and employees to divert the uses of the water from the waterworks system to any free and charitable purpose that they might deem beneficial to the community, or to the particular undertaking attempted to be served. In no event should the rule of respondeat superior apply to any greater extent to a municipality when it is the master than to a private corporation, or an individual occupying that relation, and it would be a new and a strange doctrine to hold the latter liable as master when his or its servant departed from the performance of the duties of his employment and undertook the accomplishment of a purpose wholly outside of the results intended to be reaped by the prosecution of the particular enterprise."

§ 343. Municipality liable in furnishing water privately.²—Where, however, the municipality undertakes to provide water service or any other municipal public utility to the individual inhabitants for their private domestic use, although this service is furnished in connection with the providing of a public service and the performance of a governmental duty, the municipality becomes liable for negligence in providing service for the private domestic purposes for the reason that in doing so it acts in the same capacity as the private corporation or individual undertaking to render such service for the purpose of realizing a revenue or some special benefit or advantage for itself and its inhabitants. As the court in the case of *Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 14 Ann. Cas. 1004, decided in 1908, said: "It may be conceded, for the purposes of this discussion, that, in so far as the city provides apparatus and water for fire protection, it acts in a governmental

² This section (§ 267 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

capacity. The city, however, was not required to assume the duty of furnishing its inhabitants water for all uses and purposes. When it acquired property, and constructed the system of waterworks for that purpose, however, it did so voluntarily, and with a view of deriving revenue therefrom. It therefore acquired, owned, and conducted its water system and the property connected therewith, except as stated above, as any other private corporation or owner would, and is liable in like manner and to the same extent as such owners would be."

That the municipality is held liable because engaged in public utility activities ostensibly for profit, even though none accrues to it, is well stated in the case of *Pearl v. Revere*, 219 Mass. 604, 107 N. E. 417: "The distinction long has been established between the liability of municipalities for acts done in their public capacity in the performance of functions required of them by the legislature for the common good and for acts done in their private capacity in the management of property voluntarily held and devoted to business enterprises undertaken for their own profit, although ultimately subserving a public need. *Oliver v. Worcester*, 102 Mass. 489, 499, 3 Am. Rep. 485; *Moynihan v. Todd*, 188 Mass. 301, 74 N. E. 367, 108 Am. St. 473. It has been repeatedly held, in the application of this well-settled distinction, that the establishment and maintenance of a system of water supply in part for the use of inhabitants who pay for the necessity thus supplied is a commercial venture, and that for negligence in connection therewith the city or town is liable as a private corporation would be in performing a similar service."

§ 344. **Two capacities of municipal corporations.**³—The case of *Aiken v. Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416, decided in 1906, made this distinction between the two capacities of municipal corporations and indicated the liability of municipalities in furnishing electric light for private domestic purposes as follows: "Speaking in general terms, it may be said that the duties which municipalities perform with respect to the public health, charities, and schools, in the protection of property against fire, and in the maintenance of the peace, are ordinarily regarded as performed as representatives of the general public; and in such cases cities and towns enjoy the same immunity from actions *ex delicto* as does the state.
* * * Coming to the purpose for which the power to erect

³ This section (§ 268 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

an electric light plant was granted, it must be admitted that public lighting serves a governmental purpose, at least in an incidental way, in that it is a check upon crime and immorality; but the element of local convenience to the inhabitants, and the extent to which such lights protect the municipal treasury against damage suits, because of streets which have become temporarily or permanently unsafe, afford a very clear basis for the assertion that such lights are a municipal utility. * * * We are satisfied that we are within the authorities in holding, as we do, that a city or town is answerable *ex delicto* for any direct invasion of the rights of third persons in the management of its public-lighting system."

In one of the leading cases distinguishing between the two capacities of municipal corporations and defining the liability of the municipality as determined by this distinction, the court permitted recovery for the negligent killing of a party by the municipality in connection with the operation of its electric light plant, which was used to light the city and to provide light to its inhabitants for domestic purposes. As the court in this case of *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, decided in 1906, said: "Such a (municipal) corporation, however, has a double character—governmental, and also proprietary and private—and, when acting in the latter capacity, its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations. * * * And that the respondent, in maintaining and operating its electric plant, was exercising, not its governmental functions, but its proprietary and private rights, is entirely clear. * * * The authorities uniformly hold that the duties arising from the operation of gas works, electric works, waterworks, and such like public utilities, are of the private nature which is required to make municipal corporations liable for damages caused by negligence therein."

This principle is well expressed in the case of *Wigal v. Parkersburg*, 74 W. Va. 25, 81 S. E. 554, 52 L. R. A. (N. S.) 465: "Municipal liability for negligence depends upon whether the negligence was in performing a governmental or nongovernmental service. If the former, it is not liable; otherwise it is liable. A governmental function can not be delegated by a municipality. It can not delegate its legislative power to enact ordinances for the government, regulation, and protection of its citizens, nor the power to enforce them. But the business of supplying its inhabitants with material necessities and comforts,

such as water, light, and street-railway service, is not governmental, and yet a municipality may engage in such business, when authorized by its charter to do so, or it may authorize it to be done by a private corporation. But, when it assumes such duties, its liability for negligence in the performance thereof is the same as that of a private corporation engaging in a similar business."

To the same effect is the decision in the case of *Seaman v. Big Horn Canal Assn.*, 29 Wyo. 391, 213 Pac. 938: "A municipality, however, that supplies the inhabitants with water does so in its proprietary or business capacity. 30 Am. & Eng. Ency. of Law, 404; Pond on Public Utilities, § 6."

§ 345. **Liability under municipal ownership.**⁴—That the municipality is liable for negligence because in the management of its property which is used for its own benefit or profit it is exercising its proprietary and business functions for the purpose of realizing a profit from the service rendered was decided also in the case of *Eaton v. Weiser*, 12 Idaho 544, 86 Pac. 541, 118 Am. St. 225, where the court said: "The city was engaged in a private enterprise, namely, that of manufacturing and selling electric light to its inhabitants. Such an engagement or enterprise is not one of the public governmental duties of municipalities. Municipal ownership in the usual and common acceptance of that term must of necessity carry with it the same duty, responsibility, and liabilities that are imposed upon and attach to private owners of similar enterprises. If the city owns and operates an electric light system, and sells light to its inhabitants, there is no reason why it should not be held to the same responsibility for injuries received on account of its negligent conduct of the business as would a private individual be who might be running an opposition plant in the same municipality and selling light to the citizens thereof. There is abundant authority to be found in the books in support of this position."

That the city is liable equally as a privately owned public utility would be for negligence in the operation of its waterworks is decided in the case of *Coleman v. La Grande*, 73 Ore. 521, 144 Pac. 468: "Action may be maintained against the city of La Grande for negligence resulting in the injury of an employee while engaged in laying a water pipe as a part of its system of waterworks which is operated by it for profit. Such a system

⁴ This section (§ 269 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

of waterworks belongs to the city in its private or proprietary capacity rather than in its governmental character, and it is liable as a private proprietor for negligence in the construction or maintenance thereof."

This rule of municipal liability is well expressed in the case of *Sykes v. Portland*, 177 Mich. 290, 143 N. W. 326: "The only duty urged by plaintiff devolving upon the defendant village is the same duty devolving upon any private corporation running an electric light plant in a city or village. This electric light plant was erected for commercial purposes, and, as this court held in *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. 546, the village is not relieved from liability for the neglect of its employees on the theory that the business relates to local governmental functions. * * * In this regard it seems to us they occupy no different position than the officers and employees of a private corporation would occupy under similar circumstances."

A municipality which fails to employ modern equipment, which would have prevented personal injury by disclosing a mechanical defect, is liable for such an injury the same as a private corporation where the business is being operated for profit and as a business function of the municipality. This principle is established and the reason upon which it is based is discussed as follows in the case of *Sanders v. Carthage* (Mo. App.), 9 S. W. (2d) 813: "The law imposed upon defendant the duty to observe the highest degree of care to keep its electric light wires in such condition as to prevent injury from an escaping current, wherever it could reasonably be anticipated that persons might come in contact with them. *Grady v. Louisiana Light, Power & Traction Co.* (Mo. App.), 253 S. W. 202, loc. cit. 204, and cases there cited. Defendant's lighting equipment in use at its plant when deceased was killed was installed in 1920 or the early part of 1921, and its superintendent testified that it had 'all of the instruments and apparatus ordinarily and customarily used by companies or cities engaged in the same kind of business.' Defendant did not have in its equipment a ground detector or other instrument which would indicate a break or a ground. * * * As we see it, the question of defendant's negligence in failing to discover the break and interference on the line where deceased was killed narrows down to the question of defendant's duty to have its switchboard equipped with ground detectors. * * * This record shows, by inference at least, that ground detectors are the result of many years of experiment and experience and

are reliable. Furthermore, it was the duty of defendant, after the storm and during the twelve hours before deceased was killed, to inspect its circuits for broken wires or other dangers from its wires to persons on the public highway, and this it did not do."

This case of *Sanders v. Carthage* was reversed and remanded (Mo.), 51 S. W. (2d) 529, because of errors in the instructions to the jury, and on the evidence, for as the Supreme Court said: "There can be no doubt that the principle of law, stated by defendant, is correct. A plaintiff can not plead specific negligence and upon failure to prove it rely upon the doctrine of *res ipsa loquitur* 'to bridge the chasm in making out a case for the jury.' * * * We therefore hold that plaintiffs' petition alleged specific negligence, and that it was erroneous to submit the case on the theory that the doctrine of *res ipsa loquitur* was applicable. * * * It is a rather reckless use of language to say that the condition of the wire was an invitation to touch it, when what, evidently, is meant is that it gave no warning of its danger. Such language should not be used in an instruction particularly after it has been previously criticized by this court. This instruction should not be given on the retrial of this case. The judgment is reversed, and the cause remanded."

While the municipality is responsible for the negligent acts of its agent or employee in the operation of its public utility plant, the action causing the injury must be within the scope of the employment and the corporate powers of the municipality, so that, where the injury occurred beyond the city limits where the municipality had no power or authority to conduct its business, no recovery was permitted because the action was not within the scope of the municipal powers. This principle is generally recognized and is well expressed in the case of *Newton v. Moultrie* (Ga.), 148 S. E. 299: "Thus, to hold a chartered city liable for the negligent act of its servant or agent, the act complained of must be both within the corporate powers of the municipality, and within the scope of the employment of the servant or agent. *Collins v. Mayor, &c., of Macon*, 69 Ga. 542; *McDonald v. Butler*, 10 Ga. App. 845, 847, 74 S. E. 573. As a general rule, a municipal corporation can not, without express or implied authority granted in its charter, exercise its corporate powers beyond the limits of the municipal boundaries. *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. 133; *Gainesville v. Dunlap*, 147 Ga. 344 (2), 94 S. E. 247. Since the only authority conferred upon the defendant municipality to erect and maintain

an electric light plant is contained in the general welfare clause of its charter, and since, under the ruling made by the Supreme Court in *Gainesville v. Dunlap*, supra, such authority does not extend beyond its corporate limits, the act of the joint superintendent in turning the current from the steam plant onto the lines of the power company outside the city, in pursuance of the company's business in serving its outside customers, even if within the scope of the superintendent's employment as a servant of the city (see *Hotel Equipment Co. v. Liddell*, 32 Ga. App. 590, 124 S. E. 92), was not within the scope of the corporate powers of the city, such as could render it liable for an improper performance of its ministerial duties."

While proper equipment must be employed to avoid injury, only that which is in general use and reasonably suitable for the purpose and not the best possible obtainable is the measure of responsibility in cases of negligence, and the defense of an "act of God" is always available, as is indicated in the case of *Milam v. Mandeville Mills*, 41 Ga. App. 62, 151 S. E. 672, where the court said: "In the instant case the effect of the charge that the defendant was not required to 'use the kind of material or the plan or kind of appliances and equipment which was the best that could be obtained' was merely to show that it was ordinary diligence and not extraordinary diligence that was required. * * * Consequently, not the best equipment obtainable, but that which is in general use and reasonably suited for the purposes intended, must be used. * * * The defense was based upon the contention that the casualty was brought about by an act of God, mixed with negligence on the part of the defendant, and the charge excepted to specifically states that 'an act of God excludes all ideas of human agencies, no matter what degree of prudence may be exercised, it could not be prevented.'"

Although negligent, recovery can not be had against a municipality for the reason that the damage from flooding occurred more than six months before any notice was given the municipality of it, because the requirement for giving notice is generally sustained as reasonable and necessary in the interest of the general public and for the purpose of giving municipal authorities opportunity to investigate and protect themselves against unfounded claims, as is indicated in the case of *National Lead Co. v. New York*, 43 Fed. (2d) 914, where the court said: "On this appeal the negligence of the city may be taken for granted, as it relies wholly on the defense of want of notice of claim within the time provided by law. * * * The decisive

feature is that that cause of action has been made the basis of this suit against the city and all damage resulting from the one flooding is traceable directly to the one break. The plaintiff had a single right of action for all damage caused by the one act of negligence, and it accrued when the damage began, instead of, as the plaintiff seems to believe, when the damage was completely done. * * * As the plaintiff has brought and tried this suit solely on a cause of action which accrued more than six months before the notice was given and that cause of action is nonsuable for want of timely notice, there is nothing to support a valid judgment against the city for any of the damages sustained."

§ 346. *Liability under commission.*⁵—Nor is the municipality any less liable in case the service is furnished through a commission created by the state as the means of providing the service by the municipality, because the commission as an instrumentality of the state is acting in its ministerial or corporate character in the management of property used for its own benefit and discharging powers and duties voluntarily assumed for its own advantage. And while the municipality in providing itself with electric light for the purpose of illuminating its streets and other public places is generally regarded as performing a governmental duty in the exercise of its police power, if in addition thereto it also provides service for private and domestic uses, the municipality to that extent stands on the same footing as would any private individual or corporation in the exercise of similar franchise rights and in the performance of like duties, for as the court in the case of *Owensboro v. Knox*, 116 Ky. 451, 25 Ky. L. 680, 76 S. W. 191, decided in 1903, said: "The city, as a body corporate, has become the owner and operator of a plant for the generation and distribution of a most subtle and dangerous agency. The degree of care, prudence, and oversight required of it in the operation of the plant ought to be the same as if it were operated by an individual. The law, in allowing damages for a neglect of such duties, is not primarily to punish the negligent operator, but to protect and to compensate the injured person. If the corporation, whether municipal or private, embarks in a business so menacing to life and safety, it ought to use that degree of care that is commensurate with the danger it creates."

⁵ This section (§ 270 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

It is generally recognized that public service commissions have the power to make and enforce necessary rules and regulations for the operation of public utilities in compliance with statutory regulations on the subject, although the commission can not exercise the legislative power of defining the regulations themselves, because this is legislative and can not be delegated to the commission, as is indicated in the case of *Compton v. Alabama Power Co.*, 216 Ala. 558, 114 So. 46, P. U. R. 1928A, 724, where the court said: "The public service commission is authorized to make 'such minor rules and regulations as are necessary or appropriate for the administration and enforcement of the general laws of the state,' and the delegation of this quasi-legislative power to administrative boards is not a violation of the constitutional prerogative of the legislature. *Park v. Bradley*, 204 Ala. 455, 458, 86 So. 28; 12 R. C. L. 1265, section 3. As said by the Supreme Court of Indiana, the true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.' The first can not be done. To the latter, no valid objection can be made.' *Blue v. Beach*, 155 Ind. 121, 140, 56 N. E. 89, 96, 50 L. R. A. 64, 80 Am. St. 195, 210; *United States v. Grimaud*, 220 U. S. 506, 517, 31 Sup. Ct. 480, 55 L. ed. 563."

§ 347. Municipality liable for damage from defective pipes.*
—In the case of *State Journal Printing Co. v. Madison*, 148 Wis. 396, 134 N. W. 909, decided in 1912, where the action was for damages resulting from water escaping from a broken main in the water system of the defendant city, which inundated the cellar of the plaintiff, the court permitted a recovery for the damages for the reason that: "In furnishing water to private consumers, the city is acting in a private business capacity, and not in its governmental capacity, and it is bound to exercise ordinary care, namely, that reasonable degree of care in view of the dangers involved which the great mass of ordinarily prudent persons engaged in the same or similar business would and do exercise under like circumstances. For any failure to exercise this degree of care proximately causing injury to another, the

* This section (§ 271 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

city is liable to the same extent that a private person or a corporation operating a waterworks system is liable; no more and no less."

The rule of liability for negligence in the maintenance and operation of a public utility is well illustrated and expressed as follows in the case of *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 Pac. 544, where the court said: "It would appear to be the duty of a gas company to make some inquiry or investigation to satisfy itself that all openings in the house pipes are closed at the time it turns on its meters. * * * It is not imposing an obligation of undue hardship upon gas companies to require them to make use of the means readily available to them to ascertain that all pipes connected with a meter to be turned on are capped. The obligation imposed by law upon a gas company as a public utility to serve all who apply to it for gas without discrimination does not command it to install or turn on meters without some assurance that the safety of the lives and property of those residing in or coming upon the premises will not be imperiled thereby. * * * In the instant case the gas company had neither turned on the meter itself nor authorized any other person to turn it on. It had, however, upon the direction of Turner, the owner of the building, installed the meter, and thus placed it within the power of another to turn it on and cause gas to flow into the premises of a tenant who had not directed that the gas supply be turned on. * * * By turning on the accessories shop meter for but a moment at the time it was set, the leakage of gas through the uncapped house pipe would have been apparent. Prudence required that it be determined whether there was an uncapped pipe before the meter was left connected with the gas mains and house pipes. The probability of an accident happening through the acts of a third person in the manner in which it did happen, in the circumstances of the case, presented an issue of fact that may well have been submitted to the jury."

§ 348. **Municipality liable for waterworks same as for streets.**—The case of *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, decided in 1896, holds the municipality liable for negligence in the operation of a waterworks system for the same reason that liability is established against it in the maintenance of its streets and sewers and other like undertakings, because this is concerned with a business undertaking on the part of the municipality, and as the court said: "It is admitted, with only a few exceptions, that a municipal corporation that en-

gages in a business for its gain and advantage, although the public are served in its performance, will be held liable, as an individual, for its actionable negligence in the conduct of its business. This is even admitted in those courts that adopt the extreme rule of the limited liability of municipal corporations. There can be no question, under the averments, but that these works are a business concern carried on by the city. It is as much so as any work or enterprise that a city may engage in."

In defining the liability of municipal corporations in the ownership and operation of their public utilities and in holding the municipality liable for flooding land adjacent to its irrigation system, the court expressed the rule as follows in *Holderbaum v. Hidalgo County Water Improvement Dist.*, No. 2 (Tex. Civ. App.), 297 S. W. 865: "But when cities assume to exercise powers not essentially of a public nature, and enter upon local functions, such as the construction and maintenance of streets, sewers, waterworks and other public utilities, and even the operation of an irrigation system for the benefit of their inhabitants (*City of Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. 702), then such cities are liable under the common law for the negligent official acts of their officers and agents, and no statute is necessary to create such liability. * * * Appellants take the position that the action of appellee in flooding and thereby injuring and destroying the value of their land amounted to a 'taking' of the land, within the contemplation of the constitutional inhibition against the taking, damaging, or destroying of private property for public use without first compensating the owner for the property so taken, damaged, or destroyed. It appears to be settled that the trespass here complained of was not a 'taking' of appellants' property within the contemplation of that inhibition, but it did amount to the 'damage' or 'destruction' of that property as there contemplated. In either event, the effect was the same, except that in the case of a 'taking' the owner must be compensated before the act of taking, whereas, in the case of 'damage' or 'destruction' the act may precede compensation."

This same court recognized and defined the liability of a municipal public utility for the negligence of its employee who was acting as its watchman and who attacked and injured a party who he thought was trespassing upon municipal property, the court saying in *Cameron County Water Improvement Dist.*, No. 1 v. *Whittington* (Tex. Civ. App.), 297 S. W. 868: "That question is as to the liability of a quasi-public corporation, of the character of the water improvement company, for the torts of

its employees. The point in issue has been clearly and fully discussed by Associate Justice Edward W. Smith in the case of *John Holderbaum v. Hidalgo County Water Improvement District No. 2* (Tex. Civ. App.), 297 S. W. 865, not yet (officially) published, and we reiterate that the water improvement district 'can not escape liability for the negligent acts of its officials and agents' in the exercise of the duties for which they were employed. In this case Martin, an employee of appellant, was acting as a guard or watchman of the property of appellant and while in the discharge of his duties attacked and injured appellee, who, he thought, was trespassing upon appellant's property. The corporation in hiring the watchman was not performing any duty to the public, but it was for the purpose of espionage of the public and the protection of the corporate property."

While a municipality is liable for damages from flooding property adjacent to its water system, the amount of damages is a question of fact and does not equal the difference in the value of the land before and after the damage was inflicted, where it appears that the injury is not permanent but may be relieved against by proper drainage. This rule on the measure of damages is well expressed as follows in *Wichita County Water Improvement Dist., No. 1 v. McGrath* (Tex. Civ. App.), 31 S. W. (2d) 457, where the court said: "The testimony is insufficient to show any relation or connection of appellant and the owners of Lake Wichita or any concerted action between them or any negligent act in which they jointly engaged. * * * The appellant assails as error the action of the trial court in rendering judgment against it for the sum of \$10,660, the difference in the market value of appellee's land immediately before and after the injury, as found by the jury, because appellee was not entitled to recover damages for permanent injuries to her land for the reason that the jury found the land was not permanently injured and that the injury thereto could be removed by drainage and leaching. * * * It is settled law in this state that the measure of damages for creating and maintaining a nuisance from which temporary injury to real estate results is not the difference in the market value of the land before and after the injury, but generally is the difference in the rental value of the land before and after the injury, together with any special damages that may be alleged and proved. * * * Whether the injury to appellee's land was permanent or temporary was a material issue, because on such finding depended the measure which should be applied to her damages. We do not feel warranted

in holding that the facts revealed by this record are such as to authorize us to ignore the findings of the jury to the effect that the injuries sustained by appellee were temporary and the nuisance could be abated and allow her to recover for permanent damages."

§ 349. **No liability under statute where duty partly governmental.**—The case of *Irvine v. Greenwood*, 89 S. Car. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363, decided in 1911, seems to be contrary to the general rule in that the court refused to make the distinction between the public, governmental function and the private business capacity of the municipality in providing municipal public utility service. This decision, however, is based upon a peculiar statutory provision, for as the court said: "Having in view the doctrine long ago laid down by the courts of this state, that municipal corporations are liable for torts only when made so by legislative enactment, the general assembly has by law expressed its will as to the extent of the liability of such corporations for torts. The courts are therefore bound to restrict the liability to the terms of the statute; and the statute authorizes no distinction between governmental and public duties, and supposed private municipal enterprises. * * * The lighting of the streets of a city is universally recognized as a public and governmental function. It can not alter the case that the same plant which supplied electricity for the street light also supplied the electricity for the lights in private dwellings and business houses."

The general rule of liability where both governmental and proprietary service is furnished is well expressed in the case of *Miller Grocery Co. v. Des Moines*, 195 Iowa 1310, 192 N. W. 306, 28 A. L. R. 815: "In the instant case, the municipality, acting in its governmental capacity, had the right to maintain and operate a waterworks plant for the purpose of fire protection in said city. At the same time, the city, in its proprietary capacity, had a right, under the statute, to operate a waterworks plant for the purpose of distributing water to the citizens of the municipality and to receive pay therefor. The same instrumentalities could be used, if available, for the twofold purpose. * * * We hold that under the statute the board of waterworks trustees was an agent of the appellant and that, for the negligent acts of said board, affecting the city in its proprietary capacity, the city is liable."

§ 350. No liability for public duty which is not commercial enterprise.—By way of further illustrating the distinction between the two capacities of municipal corporations in another connection the case of *Haley v. Boston*, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005, decided in 1906, furnishes a different application of this principle of municipal liability in connection with an injury sustained by the negligence of the municipality in collecting ashes from its citizens for profit. In refusing recovery, however, for such an injury because the work which was being performed by the municipality was of a public nature the court said: "The general rule is well settled in this commonwealth that a city or town which voluntarily undertakes work of a commercial character, from which it seeks to derive revenue or other special advantage, is liable like a private employer for the negligence of its servants or agents who are engaged therein. * * * But these exceptions never had been held in this commonwealth to affect the general rule that a city or town is not to be held to any liability for the negligence of persons employed by it in work merely of a public character required or authorized to be done and undertaken without compensation in the performance of a public duty. * * * It becomes material, then, to determine what is the character of this work of removing ashes from dwelling houses; and it seems to us to be work of a public nature. It is provided by statute that a town may contract for the disposal of its garbage, refuse, and offal. * * * In this case it appears that at the time of the accident the cart in question was removing only dwelling house ashes."

In the exercise of its governmental capacity in the regulation of its streets, the city may authorize the erection and maintenance of poles for electrical wires where they do not interfere substantially with the use of the streets for transportation, nor is the private corporation necessarily negligent for placing and maintaining the poles in the street under such conditions with the consent or acquiescence of the city, for as the court said in the case of *South Georgia Power Co. v. Smith*, 42 Ga. App. 100, 155 S. E. 80: "Where it is not prohibited by law, a city may legally erect and maintain an obstruction in one of its streets, provided the obstruction is not dangerous and does not constitute an unreasonable interference with the lawful use of the street. 9 R. C. L. 1193; 13 R. C. L. 199; 26 R. C. L. 527. Where, in a city street about eighty feet wide, the city has authorized the erection and maintenance, longitudinally down the middle of the

street, of a series of poles which support electrical wires, and on either side of the poles there remain driveways, each of which is about forty feet in width, and the obstruction causes no substantial interference with the lawful use of the street, the maintenance of the poles in the street is lawful, and where this is not dangerous, the maintenance of the poles in the street does not constitute negligence either as a matter of law or in fact. The maintenance of the poles in the street, being lawful and not creating a situation inherently dangerous or which from its nature is calculated to injure persons or property lawfully using the street, does not constitute negligence, either as a matter of law or in fact, as respects persons lawfully using the street. * * * Since the city could have lawfully authorized the erection of the poles in the middle of the street, the acquiescence by the city of the maintenance of the poles in the middle of the street, although they had originally been erected there by the power company in violation of the restriction placed by the city on the manner of their erection, amounts to a waiver by the city of the restriction which it had imposed upon the power company, and the maintenance by the power company, of the poles in the middle of the street, while acquiesced in by the city, and where otherwise not unlawful, does not, as to persons lawfully using the street, constitute negligence as a matter of law."

§ 351. Liability for negligent maintenance of waterworks property.⁷—As furnishing a still different distinction of the capacities of municipal corporations and the liability depending thereon, the case of *Winona v. Botzet*, 169 Fed. 321, 23 L. R. A. (N. S.) 204, decided in 1909, is of value. The decision which states all the necessary facts is in the following language: "The duty was imposed upon the city to exercise care to render this highway reasonably safe for travelers, and it blew a whistle within 110 feet of it, which made it unsafe for travelers, and which constituted a public nuisance within the express terms and plain meaning of this statute. * * * A city has two classes of powers—the one, legislative, public, in the exercise of which it acts as a political subdivision and delegate of the state and governs its people; the other, private, corporate business, in the exercise of which it acts for the advantage of the inhabitants of the city and of itself as a legal personality. * * * But for damages caused by the wrongful acts and omissions of its offi-

⁷ This section (§ 275 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

cers and agents within the scope of their authority in the exercise of its powers of the latter class, such as its power to build and maintain bridges, streets, and highways, the power to construct and keep in repair sewers * * * and the power to build, maintain, and operate waterworks to furnish water to the city and to its inhabitants for compensation⁸ the city is liable to the same extent as a private individual or corporation under like circumstances. The power of a city to construct and operate waterworks is not a political or governmental, but a private or corporate, power, granted and exercised, not to enable it to control its people, but to authorize it to furnish to itself and its inhabitants water for their private advantage."

§ 352. **Liable only for ordinary use of water.**⁹—This distinction between the two capacities of municipal corporations, which determines their liability for negligence and indicates a further practical limitation of such a liability, is well defined in the case of *Oakes Mfg. Co. v. New York*, 206 N. Y. 221, 99 N. E. 540, 100 N. E. 414, 42 L. R. A. (N. S.) 286, decided in 1912, where the court denied recovery for negligence against the defendant for furnishing water to the plaintiff that was impure, because the plaintiff knew of its impurity which only affected its use for manufacturing purposes, which was a peculiar one, and because the supply was healthful and satisfactory for ordinary domestic uses. In the course of its opinion the court said: "But in the present case, when in accordance with the powers conferred on it the city undertook to maintain a municipal water system and to supply to private consumers at a fixed compensation, it was not acting in such [governmental] capacity as above stated. It entered on an enterprise which involved the ordinary incidents of a business wherein was sold that which people desired to buy which might become a source of profit, and under these circumstances it became liable for breach of contract or for negligence as the proprietor of a private business might become."¹⁰ * * * There was no contract between the defendant and the plaintiff, whereby the former undertook to supply proper water and of

⁸ *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Wiltse v. Red Wing*, 99 Minn. 255, 109 N. W. 114.

⁹ This section (§ 276 of 2d edition) quoted in *Harber v. Phoenix (Ariz.)*, P. U. R. 1918D, 352.

¹⁰ *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468;

In re *Board of Rapid Transit Comrs.*, 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366; *Messersmith v. Buffalo*, 138 App. Div. 427, 122 N. Y. S. 918; *Piper v. Madison*, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. (N. S.) 239, 133 Am. St. 1078.

which it made a breach for which recovery can now be had. Moreover, this is an action of negligence and not for breach of contract. Plaintiff is not entitled to recover on account of the impure water which has been supplied to it within the principles of those cases which recognize the rule of liability where a municipality negligently supplies impure water to a consumer who in ignorance of its quality uses the same and suffers. In this case it appears without dispute that the plaintiff understood the character of the water which was being supplied to it, and it could not voluntarily use it with knowledge of its impurities and then recover damages because of them."

By virtue of a statutory enactment the city was held liable for negligence in the matter of the repairing of its own water-works in the case of *Blake-McFall Co. v. Portland*, 68 Ore. 126, 135 Pac. 873: "When a special power or privilege is conferred upon or granted to a municipality, to be exercised for its own advantage or emolument, and not as a mere government agency, it is liable to the same extent as an individual or private corporation in the management or dealing with the property held by it under such grant. *Esberg Cigar Co. v. Portland*, 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. 651, *supra*. If property belonging to the city is used in part for municipal or public purposes, and in a considerable part also as a source of revenue, the city will be liable for an injury caused by the negligence of its servants and agents in the repairing or neglecting to repair such property. *Oliver v. City of Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Wagner v. Portland*, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300, *supra*. As we understand the record, it is not claimed in the case under consideration that it was the duty of the fire department to construct or repair the main in question. Neither does it appear that the main was constructed in any manner different from the general water system of which it was a part."

That the city is equally liable for the negligence of its water-works with privately owned plants is well expressed in the case of *Powers v. Mechanicville*, 163 App. Div. 138, 148 N. Y. S. 452: "This is the burden cast upon a quasi-public corporation exercising a special franchise, and in these days when public sentiment is demanding that private corporations shall assume the burden of compensating persons for their own negligence, it is not unreasonable that municipal corporations, conducting profit-earning enterprises occupying the public highways, should be held to at least an equal responsibility with other corporations carrying on like enterprises. When a municipal corporation under-

takes commercial enterprises, it should do so under the same responsibilities that attach to any private corporation engaged in the same line, and it is not to be doubted that a private corporation operating a water plant in the village of Mechanicville, which unnecessarily obstructed a public highway in the manner in which it is conceded the defendant has done, would be liable to a person injured through such obstruction. It is not a defect in the highway; it is an unlawful, because unnecessary, obstruction in the highway. It is an obstruction placed and maintained by the municipality in its capacity of a private corporation in conducting a water system for supplying the inhabitants with water, and it has no more right to maintain such an obstruction than any other water company or street railway company. * * * If municipalities are to undertake the functions of transportation and business corporations, they must, in the absence of legislative exemptions, conform to the same rules as those applied to other corporations and individuals under the same circumstances."

To the same effect is the decision in the case of *Van Alstyne v. Amsterdam*, 119 Misc. 817, 197 N. Y. S. 570: "There is, however, no longer a question but that a municipal corporation in furnishing a water supply to its inhabitants, is acting in a corporate and not in a governmental capacity, and that in such capacity it is liable for its negligence. *Oakes Manufacturing Co. v. New York*, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N. S.) 286; *Canavan v. Mechanicville*, 229 N. Y. 473, 128 N. E. 882, 13 A. L. R. 1123. * * * The liability of defendant is not based upon any fault in the original construction, or the original plans. It is based on faulty maintenance, and disregard of warnings which were unmistakable and which were clearly recognized, but not heeded."

This principle and the reason for it are well stated in the case of *Jones v. Mt. Holly Water Co.*, 87 N. J. L. 106, 93 Atl. 860: "From the testimony it is also apparent that the bad condition of the water supply and the nature and character of the sources of the pollution were matters which were so open and above the surface that they would give rise to the fair inference that those conditions were known to the defendant company, or at least ought to have been known by it, before January, 1912. Besides all this, there was proof of actual knowledge of the defendant company of the pollution of the water and the sources of its pollution, extending back a period of three and one-half years prior to the outbreak of the typhoid fever epidemic. * * *

It must be borne in mind that the defendant company was in the water supply business for profit. The plaintiff had paid for the supply which he was to receive in advance. Hence it became the duty of the defendant company to give to the plaintiff water fit for domestic purposes, including fitness for drinking. Water is a necessity of life, and one who undertakes to trade in it and supply customers stands in no different position to those with whom he deals than does a dealer in foodstuffs. He is bound to use a reasonable care that whatever is supplied for food or drink shall be ordinarily and reasonably pure and wholesome."

